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JAYA SUDHIR JAYARAM v. NAUTICAL SUPREME SDN BHD & ORS

FEDERAL COURT, PUTRAJAYA
RAMLY ALI FCJ
AZAHAR MOHAMED FCJ
B ABANG ISKANDAR FCJ
IDRUS HARUN FCJ
VERNON ONG LAM KIAT JCA
[CIVIL APPEAL NO: 02(i)-83-09-2018(W)]
1 JULY 2019

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ARBITRATION: *Proceedings – Injunction – Application for injunction to restrain arbitration proceedings – Whether requirements of s. 10 of Arbitration Act 2005 must be met by party litigant seeking injunction to restrain prosecution of arbitration to which he was not party but which would affect his proprietary rights* D *– Whether s. 8 of Arbitration Act 2005 applied to party litigant who was not party to arbitration agreement and/or arbitration proceedings – Issues relating to a party who was not subjected to arbitration – Whether priority should be given for matter to be dealt with by court – Whether there was multiplicity, duplication and overlap of issues in arbitration and suits – Whether court proceedings should proceed ahead* E *of arbitration proceedings – Whether there would be prejudice if injunction granted – Whether oppressive, vexatious and unconscionable for arbitration proceedings to continue – Whether injunction ought to be granted*

CIVIL PROCEDURE: *Injunction – Arbitration – Application for injunction to restrain arbitration proceedings – Whether requirements of s. 10 of Arbitration Act* F *2005 must be met by party litigant seeking injunction to restrain prosecution of arbitration to which he was not party but which would affect his proprietary rights – Whether s. 8 of Arbitration Act 2005 applied to party litigant who was not party to arbitration agreement and/or arbitration proceedings – Issues relating to a party who was not subjected to arbitration – Whether priority should be given for matter* G *to be dealt with by court – Whether there was multiplicity, duplication and overlap of issues in arbitration and suits – Whether court proceedings should proceed ahead of arbitration proceedings – Whether there would be prejudice if injunction granted – Whether oppressive, vexatious and unconscionable for arbitration proceedings to continue – Whether injunction ought to be granted*

H This was the appellant's appeal against the order of the Court of Appeal by which the first respondent's appeal was allowed and the *inter partes* injunction order ('the injunction order') against the first, second and third respondents granted by the High Court was consequently set aside. The present action, which preceded the injunction application and order, was commenced by the I appellant at the High Court against the first to third respondents. The

appellant's claim was basically of a proprietary nature in the form of shares in the third respondent. The subject matter of the claim included the 10% shares in the third respondent registered in the second respondent's name but subsequently transferred to the appellant. The appellant's pleaded position was that the third respondent was a joint venture company with the first and second respondents as the initial shareholders, each holding 20% and 80% shares respectively in the third respondent. The third respondent was formed to undertake a project to build, own and manage tug boats and for the provisions of harbour tags services for a project by Vale Malaysia Minerals Sdn Bhd ('the Vale project'). It was, however, in need of funds to carry out the project and this was where the appellant came into the picture. The crucial part of the appellant's claim herein lay in what he claimed to be a collateral understanding between him, the first and second respondents, for his agreement to come in as an investor. Pursuant to the collateral understanding, the appellant requested for the transfer of 10% shares in the third respondent from the second respondent to himself. The 10% shares in the third respondent held in the second respondent's name was therefore transferred to the appellant. In this action, the appellant sought a declaration that, *inter alia,* (i) the first respondent was bound by the terms of the collateral understanding; (ii) the appellant was the legal and registered beneficial owner of the 10% shares in the third respondent; and (iii) an injunction to restrain, *inter alia*, the first respondent from commencing and continuing any legal proceedings or arbitration which affected or impacted upon the rights attached to the 10% and 70% shares registered in the name of the appellant and the second respondent respectively without the presence of the appellant as a party to such legal proceedings or arbitration. The first respondent, however, disagreed with the appellant's contention. The first respondent alleged that the transfer of shares to the appellant was in contravention of the terms and conditions of the shareholders' agreement ('shareholders' agreement') which prohibited the transfer of shares in the third respondent to a third party. This led to the first respondent issuing a notice of breach against the second and third respondents. Pursuant to the said notice of breach, the first respondent commenced arbitration proceedings against the second and third respondents pursuant to the arbitration clause in the shareholders' agreement. The first respondent had also commenced civil suits at the High Court, one of which was the 544 Suit against the appellant premised on the tort of inducement, where it sought to claim damages from the appellant for inducing the second and third respondents to breach the shareholders' agreement. The 544 Suit was filed by the first respondent separately against the appellant in relation to the impugned transfer as the appellant was not a party to the arbitration agreement. Midstream the hearing of the injunction application, the second and third respondents moved an

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A application to stay the proceeding in the instant action pending the determination of the arbitration and the 544 Suit. The High Court Judge ('HCJ') allowed the injunction order and dismissed the stay application. It was held by the HCJ that as the appellant was not subjected to the shareholders' agreement, the appellant was not, and could not, be made a
B party to the arbitration proceedings. The Court of Appeal, however, allowed the first respondent's appeal and held that the provisions of ss. 10(1) and 10(3) of the Arbitration Act 2005 ('AA') applied to persons who were non-parties to arbitration proceedings. The Court of Appeal also held that inordinate delay was a material factor and could be fatal to an application
C for an injunction and that there was no reasonable explanation, by the appellant, to justify the delay. On the issue of multiplicity of suits and possibility of inconsistent findings between the court and arbitration, the Court of Appeal held that it was no longer material consideration under the AA. Leave to appeal was granted by this court upon two questions of law, namely: (i) whether the requirements of s. 10 of the AA must be met by a
D party litigant seeking an injunction to restrain the prosecution of an arbitration to which he was not a party but which would affect his proprietary rights; and (ii) whether s. 8 of the AA applied to a party litigant who was not a party to an arbitration agreement and/or arbitration proceedings.

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Held (allowing appeal with costs; setting aside order of Court of Appeal)
Per Idrus Harun FCJ delivering the judgment of the court:

(1) There was no arbitration agreement between the appellant and the first respondent as defined in s. 9 of the AA, whether in relation to the subject
F matter of the appellant's claim in this action or otherwise. The appellant was also not a party to the arbitration proceedings as defined in s. 2 of the AA. It was thus not possible for the appellant or the first respondent to refer this action to arbitration. The appellant's claim in this action and the injunction application therefore did come within the ambit and scope
G of s. 10(1) of AA. (para 32)

(2) Section 10(3) of AA is linked to s. 10(1). This could be seen by the opening words 'where the proceedings referred to in subsection (1) have been brought ...'. The word 'proceedings' referred to court proceedings which were brought in respect of a matter which was the subject of an
H arbitration agreement. In this judgment, s. 10(1) of the AA was of no application and did not apply to the applicant's claim in the instant suit as it was plain that the matter in respect of which the instant action was brought was not the subject of an arbitration agreement between the parties to this action. That being the case, s. 10(3) of AA was also of no

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application. Since ss. 10(1) and (3) of the AA were of no application to this action, to contend otherwise was an overreach and leaned away from the clear legislative intent of the provisions of the law in AA. (para 38)

(3) To hold that s. 8 of the AA applied to the appellant's claim and the injunction application would result in an absurdity. The Court of Appeal did not seem to realise that none of the prescribed powers under the AA were of application or utility to the appellant for the simple reason that there was neither arbitration agreement nor arbitration proceedings in relation to the claim in court. The wide jurisdiction and powers conferred upon court by the provisions in court proceedings relating to arbitration would be severely curtailed, constricted or fettered in instances where there was no arbitration agreement and the claim before the court was not before arbitration as was the appellant's case. Absurdity would thus inevitably ensue in the event that s. 8 of the AA was held to be applicable to a non-party to any arbitration proceedings or arbitration agreement such as the applicant. Section 8, therefore, did not apply to the appellant's claim in the instant suit and the injunction application. (para 42)

(4) The primary consideration on whether to grant the injunction to restrain the arbitration proceedings, where the rights of a non-party thereto are involved, is what would be the fairest approach to all parties. It must not result in any party suffering a severe disadvantage and for the ends of justice to be met, the benefits must outweigh the advantage. Where the issues relate to any party who is not subjected to arbitration, priority should be given for the matter to be dealt with by the court particularly, *inter alia,* (i) where the matter was the same as with in the instant case and that this would be the fairest approach as the non-party to the arbitration proceedings would not be left out in the cold and his rights affected; (ii) where this would avoid conflicting results arising from two parallel proceedings; and (iii) that any arbitral award given would necessarily involve the shares that were the subject matter of this action thereby impacting the appellant's claim over the shares. (para 69)

(5) Upon a consideration of the issue of commonalities between the instant suit, the 544 Suit and the arbitration proceedings, there were clear and unarguable similarities and significant overlap between both suits and the arbitration proceedings. Due to the similarities, it was immediately clear that apart from the possibilities and risks, costs would also be duplicated in the event that both the present consolidated suit and the arbitration proceedings were to proceed simultaneously. This suit and the 544 Suit were already at the trial stage. These factors, taken together

A with the other risks and possibilities, attached a very strong and significant degree of credence to the argument of the appellant that this suit should take precedence over the arbitration. Hence, the injunction granted by the HCJ was undoubtedly correct. (para 71)

B **(6)** There was a significant degree of multiplicity, duplication and overlap of issues in the arbitration, this suit and the 544 Suit. Multiplicity of concurrent proceedings and duplicity of issues ought to be avoided and circumvented. The subject matter in this suit, the 544 Suit and the arbitration proceedings were the same, namely the 10% shares in the third respondent presently registered in the name of the appellant and C part of the 70% shares in the third respondent presently registered in the name of the second respondent. In terms of the injunction order, the net effect was such that the court proceedings should proceed ahead of the arbitration proceedings. Hence, the Court of Appeal misdirected itself, in law and in fact, in rejecting the issue of multiplicity of proceedings D and risk of inconsistent findings as a material and relevant factor in the instant injunction application. (para 81)

(7) The appellant's injunction application did not fall far short of the requirements set out in the *J Jarvis* test. There was no prejudice to the first respondent in the event that an injunction was granted. The first E respondent was at liberty to also pursue the 544 Suit in which the first respondent was seeking similar relief in relation to the 10% shares in the third respondent as against the appellant. The said 10% shares in the third respondent, which was the subject matter of the dispute, were presently preserved, whether through undertakings or injunction orders. F It would be oppressive, vexatious and unconscionable for the arbitration proceedings to continue because the appellant was not a party thereto while his proprietary rights were sought to be impinged. It was just plainly inappropriate for the first respondent, in their move to ensure that their arbitration ought to be heard first, to ride roughshod over the G appellant who stood in their way and whose claim was similar and inextricably linked to the claims before the arbitration. This was made manifest by the fact that where the arbitration was allowed to proceed first, it would be a trial against the appellant *in absentia*. There was a need to circumvent multiplicity of proceedings to avoid the same subject matter of both proceedings from being fought on two fronts before H different tribunals and risks of inconsistent findings. There could be no doubt whatsoever that these were real risks and possibilities, not a mere fanciful scenario. (para 82)

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(8) As for the alleged inordinate delay on the appellant's part, the appellant had explained the various circumstances in the affidavits leading to the filing of this suit. The injunction application was filed on 29 August 2017, the reason being that the appellant did not wish to escalate matters as there were ongoing without prejudice negotiations to resolve the impasse. The appellant viewed these negotiations ought to be given an opportunity to hopefully yield a positive result without any escalation of fresh proceedings. The chronology of events justified why the application for the injunction was filed at the material time. This court was satisfied that the alleged delay was explicable and the forbearance of parties who were in the midst of settlement negotiations was an acceptable and satisfactory explanation in the circumstances of this case. Thus, the allegation of a ten-month delay was misplaced. This court did not consider that the delay had in some way made it unjust to grant the injunction sought or to have been such a nature as to disentitle the appellant to the relief. (paras 85-87)

(9) All the three respondents were parties to the shareholders' agreement. One of the terms of the said agreement was that any issues to the agreement would be subjected to arbitration proceedings. The respondents had assented to participate in the arbitration proceedings. It was in this context that the appellant had pleaded his defence in the 544 Suit, in that all the three respondents were subjected to the arbitration proceedings by virtue of the shareholders' agreement. The appellant was not a contracting party to the shareholders' agreement and the foundation of his claim was not with the said agreement but with what he alleged as the collateral understanding. As the appellant was not a party to the shareholders' agreement, he could not seek recourse through the arbitration proceedings. He could only ventilate his claim through this suit. The injunction sought was to restrain the arbitration proceedings and that it was done for the appellant's benefit. The appellant's application in essence was the appellant's bid to preserve his claim over the shares. (paras 96 & 97)

(10) An injunction would be issued where the balance of justice was as such. There were serious issues to be tried and the balance of convenience lay in favour of the instant case proceedings over the arbitration. The appellant's position throughout was to the effect that it was incumbent upon the appellant to establish his own case and to justify the grant of the injunction sought and this he actually succeeded in doing so. There were no appealable errors made by the HCJ in the proper exercise of his discretion to grant the injunction sought warranting the intervention of the Court of Appeal. (para 98)

A ***Bahasa Malaysia*** *Headnotes*

Ini adalah rayuan perayu terhadap perintah Mahkamah Rayuan yang membenarkan rayuan responden pertama dan perintah injunksi *inter parte* ('perintah injunksi') terhadap responden pertama, kedua dan ketiga, yang diberi oleh Mahkamah Tinggi, diketepikan. Guaman ini, yang mendahului
B permohonan dan perintah injunksi dimulakan oleh perayu di Mahkamah Tinggi terhadap responden pertama hingga ketiga. Tuntutan perayu, pada dasarnya, dalam bentuk saham dalam responden ketiga. Subjek perkara tuntutan termasuk 10% saham dalam responden ketiga yang didaftarkan dalam nama responden kedua tetapi kemudiannya dipindah milik pada
C perayu. Kedudukan yang diplidkan perayu adalah bahawa responden ketiga adalah sebuah syarikat usaha sama dengan responden pertama dan kedua sebagai pemegang-pemegang saham, yang masing-masing memegang 20% dan 80% saham dalam responden ketiga. Responden ketiga dibentukkan untuk menjalankan projek membina, memiliki dan menguruskan bot-bot tunda dan
D untuk perbekalan-perbekalan perkhidmatan label-label pelabuhan untuk sebuah projek oleh Vale Malaysia Minerals Sdn Bhd ('projek Vale'). Walau bagaimanapun, responden ketiga memerlukan dana untuk melaksanakan projek dan ini membawa kepada penglibatan perayu. Bahagian penting tuntutan perayu adalah berkenaan persefahaman kolateral antaranya,
E responden pertama dan kedua, untuk persetujuannya memasuki sebagai pelabur. Menurut persefahaman kolateral, perayu meminta untuk pindah milik 10% saham dalam responden ketiga daripada responden kedua kepada dirinya sendiri. Saham-saham tersebut yang dipegang dalam nama responden kedua dengan itu dipindah milik kepada perayu. Dalam guaman ini, perayu menuntut pengisytiharan bahawa, antara lain (i) responden pertama terikat
F dengan syarat-syarat persefahaman kolateral; (ii) perayu adalah pemilik sah berdaftar 10% saham dalam responden ketiga; dan (iii) satu injunksi untuk menghalang, antara lain, responden pertama daripada memulakan atau meneruskan apa-apa prosiding undang-undang atau timbang tara yang menjejaskan atau membawa kesan terhadap hak-hak yang bersangkutan 10%
G saham dan 70% saham yang didaftarkan dalam nama perayu dan responden kedua masing-masing tanpa kehadiran perayu sebagai pihak kepada prosiding-prosiding undang-undang atau timbang tara. Responden pertama, walau bagaimanapun, tidak bersetuju dengan hujahan perayu. Responden pertama mendakwa bahawa pindah milik saham-saham kepada perayu
H bertentangan dengan terma-terma dan syarat-syarat perjanjian pemegang-pemegang saham ('perjanjian pemegang-pemegang saham') yang melarang pindah milik saham dalam responden ketiga kepada pihak ketiga. Susulan itu, responden pertama mengeluarkan notis pelanggaran terhadap responden kedua dan ketiga. Selaras dengan notis pelanggaran tersebut, responden
I pertama memulakan prosiding timbang tara terhadap responden kedua dan

ketiga bawah klausa timbang tara dalam perjanjian pemegang-pemegang saham. Responden pertama juga telah memulakan beberapa guaman sivil di Mahkamah Tinggi, salah satunya Guaman 544, terhadap perayu berdasarkan tort dorongan, dengan tuntutan ganti rugi daripada perayu kerana telah mendorong responden kedua dan ketiga melanggar perjanjian pemegang-pemegang saham. Guaman 544 difailkan oleh responden pertama secara berasingan terhadap perayu berhubungan pindah milik yang dipertikaikan kerana perayu bukan pihak dalam perjanjian timbang tara. Semasa perbicaraan permohonan injunksi, responden kedua dan ketiga telah membuat permohonan menggantung prosiding dalam guaman ini sementara menunggu penentuan timbang tara dan Guaman 544. Hakim Mahkamah Tinggi ('HMT') membenarkan perintah injunksi dan menolak permohonan penggantungan. Hakim Mahkamah Tinggi memutuskan perayu tidak tertakluk pada perjanjian pemegang-pemegang saham, dan perayu bukan dan tidak boleh dijadikan pihak prosiding timbang tara. Mahkamah Rayuan, walau bagaimanapun, membenarkan rayuan responden pertama dan memutuskan peruntukan-peruntukan ss. 10(1) dan (3) Akta Timbang Tara 2005 ('ATT') diguna pakai terhadap pihak-pihak yang bukan pihak-pihak dalam prosiding timbang tara. Mahkamah Rayuan juga memutuskan bahawa kelengahan melampau adalah satu fakta material dan menjejaskan permohonan injunksi dan bahawa tiada alasan munasabah diberikan oleh perayu untuk menjustifikasikan kelewatan itu. Berkenaan isu kepelbagaian guaman dan kemungkinan dapatan yang tidak konsisten antara mahkamah dan timbang tara, Mahkamah Rayuan memutuskan bahawa ini bukan lagi pertimbangan material bawah ATT. Kebenaran untuk merayu dibenarkan oleh mahkamah ini atas dua soalan undang-undang iaitu: (i) sama ada keperluan s. 10 ATT harus dipenuhi oleh pihak pendakwa menuntut injunksi untuk menghalang pendakwaan timbang tara yang dia bukan pihak padanya tetapi hak miliknya akan terjejas; dan (ii) sama ada s. 8 ATT diguna pakai terhadap pihak pendakwa yang bukan pihak pada perjanjian/prosiding timbang tara.

Diputuskan (membenarkan rayuan dengan kos; mengetepikan perintah Mahkamah Rayuan)

Oleh Idrus Harun HMP menyampaikan penghakiman mahkamah:

(1) Tiada perjanjian timbang tara antara perayu dan responden pertama seperti ditakrifkan dalam s. 9 ATT, sama ada berhubungan subjek perkara tuntutan perayu dalam tindakan ini atau sebaliknya. Perayu juga bukan pihak pada prosiding timbang tara seperti ditakrifkan dalam s. 2 ATT. Oleh itu, tidak mungkin perayu atau responden pertama merujuk pada tindakan ini pada timbang tara. Tuntutan perayu dalam tindakan ini dan permohonan injunksi oleh itu tidak terangkum dalam lingkungan dan skop s. 10(1) ATT.

(2) Seksyen 10(3) ATT bersangkutan dengan s. 10(1). Ini boleh dilihat dengan perkataan-perkataan pembuka 'where the proceedings referred to in subsection (1) have been brought …' . Perkataan 'proceedings' merujuk pada prosiding mahkamah yang dibawa berkaitan perkara yang menjadi subjek perjanjian timbang tara. Dalam penghakiman ini, s. 10(1) ATT tidak diguna pakai terhadap tuntutan pemohon dalam guaman ini kerana adalah jelas perkara berhubungan guaman ini bukan subjek perjanjian timbang tara antara pihak-pihak dalam tindakan ini. Oleh itu, s. 10(3) ATT tidak diguna pakai. Oleh kerana ss. 10(1) dan (3) ATT tidak diguna pakai terhadap guaman ini, untuk menyatakan sebaliknya adalah melampaui batas kemampuan dan berpaling daripada maksud perundangan jelas peruntukan-peruntukan undang-undang ATT.

(3) Memutuskan s. 8 ATT diguna pakai pada tuntutan dan permohonan injunksi perayu akan mengakibatkan kemustahilan. Mahkamah Rayuan tidak menyedari bahawa kuasa-kuasa yang ditentukan bawah ATT tiada kegunaan atau utiliti buat perayu kerana perjanjian atau prosiding timbang tara tiada kaitan dengan tuntutan di mahkamah. Bidang kuasa luas dan kuasa-kuasa yang diberikan kepada mahkamah oleh peruntukan-peruntukan prosiding mahkamah berhubungan timbang tara akan dibatasi, disekat atau dibelenggu dalam keadaan tiada perjanjian timbang tara dan tuntutan di mahkamah, bukan timbang tara, seperti kes perayu. Kemustahilan tidak dapat dielakkan sekiranya s. 8 ATT diputuskan diguna pakai terhadap bukan pihak kepada mana-mana prosiding atau perjanjian timbang tara seperti pemohon. Oleh itu, s. 8 tidak diguna pakai terhadap tuntutan perayu dalam guaman ini dan dalam permohonan injunksi.

(4) Pertimbangan utama sama ada untuk memberikan injunksi melarang prosiding timbang tara dalam keadaan hak-hak bukan pihak terlibat adalah pendekatan paling adil untuk semua pihak-pihak. Ini tidak sepatutnya mengakibatkan mana-mana pihak mengalami kekurangan dan untuk keadilan dicapai, faedah mesti melebihi keuntungan. Dalam keadaan isu-isu berhubungan mana-mana pihak yang tidak tertakluk pada timbang tara, keutamaan harus diberikan untuk perkara ditangani oleh mahkamah, antara lain (i) dalam keadaan perkara adalah sama dengan guaman ini dan ini adalah pendekatan paling adil kerana bukan pihak pada prosiding timbang tara tidak akan terbiar dan hak-haknya terjejas; (ii) dalam keadaan dapat mengelakkan keputusan bercanggah yang timbul daripada dua prosiding selari; dan (iii) bahawa mana-mana award timbang tara yang diberikan akan melibatkan saham-saham yang menjadi subjek perkara tindakan ini, dengan itu memberi kesan kepada tuntutan perayu atas saham-saham.

(5) Apabila mempertimbangkan isu persamaan antara guaman ini, Guaman 544 dan prosiding timbang tara, terdapat persamaan yang jelas dan tidak boleh dibantah serta tumpang tindih yang ketara antara kedua-dua guaman dan prosiding timbang tara. Disebabkan persamaan-persamaan itu, adalah jelas bahawa selain kemungkinan-kemungkinan dan risiko-risiko, kos-kos juga akan diduplikasi dalam keadaan kedua-dua guaman yang disatukan dan prosiding timbang tara diteruskan pada masa yang sama. Guaman ini dan guaman 544 sudah berada di peringkat perbicaraan. Faktor-faktor ini, diambil bersama-sama dengan risiko-risiko dan kemungkinan-kemungkinan yang lain, melampirkan tahap kepercayaan yang sangat kuat dan penting pada hujahan perayu bahawa guaman ini harus mengambil keutamaan atas timbang tara. Oleh itu, injunksi yang diberikan oleh Mahkamah Tinggi adalah, tanpa diragui, betul.

(6) Terdapat kadar kepelbagaian, duplikasi dan pertindihan isu dalam timbang tara, guaman ini dan Guaman 544 yang agak signifikan. Kepelbagaian prosiding serentak dan duplikasi isu-isu harus dielakkan dan dipintas. Subjek perkara dalam guaman ini, Guaman 544 dan prosiding timbang tara adalah sama, iaitu 10% saham-saham dalam responden ketiga yang didaftarkan dalam nama perayu dan sebahagian 70% saham dalam responden ketiga yang didaftarkan dalam nama responden kedua. Dalam soal perintah injunksi, kesannya adalah prosiding mahkamah harus diteruskan sebelum prosiding timbang tara. Oleh itu, Mahkamah Rayuan telah tersalah arah, dari segi undang-undang dan fakta, apabila menolak isu kepelbagaian prosiding dan risiko dapatan tidak konsisten sebagai fakta yang penting dan relevan dalam permohonan injunksi ini.

(7) Permohonan injunksi perayu tidak terlalu jauh daripada keperluan-keperluan yang dibentangkan dalam ujian *J Jarvis*. Ini kerana tiada prejudis terhadap responden pertama jika injunksi dibenarkan. Responden pertama diberikan kebebasan untuk meneruskan Guaman 544 dan responden boleh menuntut relief-relief yang sama berhubungan 10% saham dalam responden ketiga terhadap perayu. Saham-saham tersebut dalam responden ketiga iaitu subjek perkara pertikaian pada masa ini terpelihara, sama ada melalui pengusahaan atau perintah injunksi. Adalah menindaskan, menyusahkan dan tidak berpatutan untuk prosiding timbang tara diteruskan kerana perayu bukan pihak sementara hak milik-hak miliknya terjejas. Dengan jelas, ini tidak sesuai untuk responden pertama, dalam tindakan mereka untuk memastikan timbang tara mereka harus didengar terlebih dahulu, untuk 'menunggang berladam' atas perayu yang sedang menghalang mereka, lebih-lebih lagi

tuntutan perayu adalah sama dan bersangkutan dengan tuntutan-tuntutan dalam timbang tara. Ini telah dibuat jelas oleh fakta bahawa apabila timbang tara diteruskan terlebih dahulu, ini akan menjadi perbicaraan terhadap perayu tanpa kehadirannya. Terdapat keperluan mengelakkan kepelbagaian prosiding demi mengelakkan subjek perkara yang sama kedua-dua prosiding daripada dibicarakan di dua bahagian di hadapan tribunal-tribunal berbeza dan risiko dapatan yang tidak konsisten. Tidak diragui, ini adalah risiko-risiko dan kemungkinan-kemungkinan yang benar dan nyata, dan bukan satu senario khayalan semata-mata.

(8) Berkenaan dakwaan kelengahan keterlaluan perayu, perayu telah menerangkan pelbagai keadaan dalam afidavit-afidavit yang diserahkan semasa pemfailan guaman ini. Permohonan injunksi difailkan pada 29 Ogos 2017 atas alasan perayu tidak ingin mengecamukkan keadaan kerana terdapat rundingan-rundingan tanpa prejudis berterusan untuk menyelesaikan kebuntuan. Perayu mengambil kira rundingan-rundingan ini harus diberi peluang untuk menghasilkan satu hasil positif tanpa apa-apa prosiding baharu. Kronologi peristiwa-peristiwa menjustifikasikan mengapa permohonan injunksi difailkan pada waktu material itu. Mahkamah ini berpuas hati bahawa kelengahan yang didakwa dapat dijelaskan dan kesabaran pihak-pihak yang dalam perundingan penyelesaian adalah penjelasan yang diterima dan memuaskan dalam keadaan kes ini. Oleh itu, dakwaan kelengahan sepuluh bulan tidak tepat. Mahkamah ini tidak mendapati bahawa kelengahan telah membuatnya tidak adil untuk membenarkan injunksi yang dituntut atau bersifat sebegitu sehingga mengakibatkan perayu hilang hak ke atas relief.

(9) Ketiga-tiga responden adalah pihak pada perjanjian pemegang-pemegang saham. Salah satu terma perjanjian tersebut adalah bahawa isu-isu pada perjanjian akan tertakluk pada prosiding timbang tara. Responden-responden telah bersetuju untuk mengambil bahagian dalam prosiding timbang tara. Dalam konteks inilah yang perayu memplidkan pembelaan dalam Guaman 544, bahawa ketiga-tiga responden tertakluk pada prosiding timbang tara menurut perjanjian pemegang-pemegang saham. Perayu bukan pihak yang berkontrak pada perjanjian pemegang-pemegang saham dan asas tuntutannya bukan dengan perjanjian tersebut tetapi pemahaman cagaran yang didakwanya. Oleh kerana perayu bukan pihak pada perjanjian pemegang-pemegang saham, perayu tidak boleh mencari jalan keluar melalui prosiding timbang tara. Perayu hanya boleh membawa tuntutannya melalui guaman ini. Injunksi yang dituntut adalah untuk menghalang prosiding timbang tara dan ini untuk manfaat perayu. Permohonan perayu pada dasarnya adalah percubaan perayu untuk mengekalkan tuntutannya atas saham-saham.

(10) Satu injunksi harus dikeluarkan apabila imbangan keadilan memerlukannya. Terdapat isu-isu serius untuk dibicarakan dan imbangan kemudahan memihak pada kes ini dan bukan timbang tara. Kedudukan perayu keseluruhannya adalah untuk perayu membuktikan kesnya dan menjustifikasikan pembenaran injunksi yang dituntut dan perayu berjaya berbuat demikian. Tiada kekhilafan oleh HMT dalam pelaksanaan budi bicaranya membenarkan injunksi yang dituntut yang mewajarkan campur tangan Mahkamah Rayuan.

Case(s) referred to:

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors [1995] 1 CLJ 461 SC ***(refd)***

Aratra Potato Co. Ltd. and Another v. Egyptian Navigation Co (The "El Amria") [1981] 2 Lloyd's Rep 119 ***(refd)***

Bina Jati Sdn Bhd v. Sum-Projects (Brothers) Sdn Bhd [2002] 1 CLJ 433 CA ***(refd)***

Carter Holt Harvey Ltd v. Genesis Power Ltd [2006] 3 NZLR 794 ***(refd)***

Chase Perdana Bhd v. Pekeliling Triangle Sdn Bhd & Anor [2008] 1 CLJ 313 FC ***(refd)***

CSR Ltd v. Cigna Insurance Australia Ltd and Others 146 ALR 402 ***(refd)***

Donohue v. Armco Inc & Ors [2002] 1 All ER (Comm) 97 ***(refd)***

Golden Screen Cinema Sdn Bhd v. MTM Realty Sdn Bhd & Another Appeal [2008] 4 CLJ 785 CA ***(refd)***

Halifax Overseas Freighters Ltd. v. Rasno Export; Techno Prominport; and Polskie Linie Oceaniczne PPW (The 'Pine Hill') [1958] 2 Lloyd's Rep 146 ***(refd)***

Incitec Ltd v. Alkimos Shipping Corporation [2004] FCA 698 ***(refd)***

Inter Maritime Management Sdn Bhd v. Kai Tai Timber Company Ltd. Hong Kong [1995] 4 CLJ 164 CA ***(refd)***

Intermet FZCO and Others v. Ansol Limited and Others [2007] EWHC 226 (Comm) ***(refd)***

J Jarvis & Sons Limited v. Blue Circle Dartfort Estates Limited [2007] EWHC 1262 ***(refd)***

Jeffery Law Siew Su & Ors v. Yu Gui [2017] 4 CLJ 665 FC ***(refd)***

Kao Che Jen v. N Chanthiran Naggapan [2015] 9 CLJ 295 CA ***(refd)***

Keet Gerald Francis Noel John v. Mohd Noor & Ors [1995] 1 CLJ 293 CA ***(refd)***

Kraft Foods Group Brands LLC and Another v. Bega Cheese Ltd 130 IPR 434 ***(refd)***

Lim Hean Pin v. Thean Seng Co Sdn Bhd & Ors [1992] 2 CLJ 828; [1992] 2 CLJ (Rep) 745 HC ***(refd)***

Lin Ming & Anor v. Chen Shu Quan & Ors [2012] HKCU 557 ***(refd)***

NKM Holdings Sdn Bhd v. Pan Malaysia Wood Bhd [1986] 1 LNS 79 SC ***(refd)***

Press Metal Sarawak Sdn Bhd v. Etiqa Takaful Bhd [2016] 9 CLJ 1 FC ***(refd)***

Protasco Bhd v. Tey Por Yee & Another Appeal [2018] 5 CLJ 299 CA ***(refd)***

Recyclers of Australia Pty Ltd and Another v. Hettinga Equipment Inc and Another 175 ALR 725 ***(refd)***

Salford Estates (No 2) Ltd v. Altomart Ltd (No 2) [2015] 3 WLR 491 ***(refd)***

Seni Jaya Sdn Bhd & Anor v Dato' Hj Ahmad Tarmizi Hj Puteh & Anor [2019] 1 CLJ 713 FC ***(refd)***

Sri Bangunan Sdn Bhd v. Majlis Perbandaran Pulau Pinang & Anor [2007] 5 CLJ 673 FC ***(refd)***

The 'Oranie' and The 'Tunisie' [1966] 1 Lloyd's Rep 477 ***(refd)***
Tomolugen Holdings Ltd and Another v. Silica Investors Ltd; and Other Appeals [2016] 1 LRC 147 ***(refd)***
Vacher & Sons Ltd v. London Society of Compositors [1913] AC 117-18 ***(refd)***
Zen Courts Sdn Bhd v. Bukit Jalil Development Sdn Bhd & Ors [2018] 7 CLJ 283 CA ***(refd)***

Legislation referred to:
Arbitration Act 2005, ss. 2, 8, 9, 10(1), (3), 11, 13(7), 15(3), 18(8), 29, 37, 41, 44(1), (4), 45, 46

Insolvency Act 1986 [UK], s. 122(1)
Rules of Court 2012, O. 29, O. 92 r. 4
Arbitration Act 1966 [NZ], s. 8
Arbitration Act 1996 [UK], s. 9

Other source(s) referred to:
Amita Dhanda, *NS Bindra's Interpretation of Statutes,* 12th edn, p 25
Daniel Greenberg, *Craies On Legislation: A Practitioners' Guide To The Nature, Process, Effect And Interpretation Of Legislation,* 11th edn, p 25

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For the 2nd respondents - Lim Tuck Sun & Najwa Hanee Hazza; M/s Chooi & Company & Cheang & Ariff (CCA Law Firm)
For the 3rd respondents - David Mathew, Olivia Loh & Malarvily Perumal; M/s Gananathan Loh

[Editor's note: For the Court of Appeal judgment, please see Nautical Supreme Sdn Bhd v. Jaya Sudhir Jayaram & Ors [2019] 3 CLJ 628 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Idrus Harun FCJ:

Introduction

[1] The appeal by Jaya Sudhir a/l Jayaram (the appellant) is directed against the order of the Court of Appeal on 24 July 2018 by which the first respondent's appeal was allowed and the *inter partes* injunction order (the injunction order) against the first, second and third respondents granted by the High Court on 6 November 2017 was consequently set aside.

[2] The present action which preceded the injunction application and order was commenced by the appellant on 8 May 2017 in the Kuala Lumpur High Court against the first to third respondents in this appeal and Dato' Seri Timor Shah Rafiq, *qua* the first defendant in the said High Court, who is not

a party in this appeal. The appellant's claim is basically of a proprietary nature in the form of shares in the third respondent. The subject matter of the claim includes the 10% shares in the third respondent registered in the second respondent's name but subsequently transferred to the appellant.

[3] On 29 August 2017, the appellant moved an injunction application and on 6 November 2017 obtained the injunction order against the first to third respondents in the court of the first instance. Essentially, the said injunction application sought to restrain these respondents from proceeding and continuing with an on-going and parallel arbitration commenced by the first respondent against the second and third respondents and the KLHC Originating Summons No. WA-24NCC (ARB)-9-02-2016 (OS 9 Suit).

Leave To Appeal

[4] The leave to appeal was granted by this court upon two questions of law on 12 September 2018 and these are:

(a) whether the requirements of s. 10 of the Arbitration Act 2005 must be met by a party litigant seeking an injunction to restrain the prosecution of an arbitration to which he is not a party but which would affect his proprietary rights; and

(b) whether s. 8 of the Arbitration Act 2005 applies to a party litigant who is not a party to an arbitration agreement and/or arbitration proceedings.

Upon hearing all learned counsel submitting on behalf of the respective parties, we adjourned for deliberation and intimated that the grounds of our decision in writing would be given later. This is our unanimous decision. It is certainly noteworthy that the second and third respondents in the course of their oral submissions supported the submission of learned counsel for the appellant.

The Background

[5] The salient facts central to this appeal are taken and summarised from the statements of claim and defence as well as the various affidavits filed by the parties in the injunction application. To begin with, the appellant's pleaded position is that the third respondent is a joint venture company with the first and second respondents as the initial shareholders each holding 20% and 80% shares respectively in the third respondent.

[6] Prior to the formation of the third respondent, a joint venture company known as Nautilus Perak Marine Services Sdn Bhd (NPMS) was incorporated on 24 June 2011 for the purpose of amongst others, bidding for the harbour tugs services and other port and maritime related services for a

project by Vale Malaysia Minerals Sdn Bhd (the Vale project). The first respondent is a wholly owned subsidiary of Dwitasik Marine Sdn Bhd (Dwitasik). Dwitasik in turn is wholly owned by Dwitasik Sdn Bhd (DSB). The first defendant is a director of Dwitasik. The second respondent, which is beneficially owned by Captain Suresh Emmanuel Abishegam (Captain Suresh), is the shareholder of the third respondent holding 700,000 ordinary shares representing 70% of the issued and paid-up capital of the third respondent. The first respondent presently holds 200,000 ordinary shares representing 20% of the issued and paid-up capital of the third respondent whereas the appellant holds the remaining 100,000 ordinary shares representing 10% of the issued and paid-up capital of the third respondent. NPMS is owned by Dwitasik Ventures Sdn Bhd (DVSB) and Azimuth Corporation Sdn Bhd (ACSB) holding 70% and 30% shares respectively. DVSB is another wholly owned subsidiary of DSB. The 70% NPMS shares held by DVSB were later transferred to the first respondent. ACSB is related to the second respondent with Captain Suresh being a common director of both companies. DVSB on the other hand is related to the first respondent with the first defendant as their common director.

[7] The third respondent is formed to undertake a project to build, own and manage tug boats and for the provisions of harbour tugs services for the Vale Project. It is however in need of funds to carry out the project. This was where the appellant came into the picture. The appellant had described himself as the 'white knight' and was confident that he would be in a position to salvage the situation. Following the appellant's entry, the shareholding structure of the first respondent was revised. It is the appellant's pleaded case that he agreed to allocate 20% of the shares in the third respondent to the first respondent and ultimately the first respondent would only hold 20% of the shares in the third respondent. As a result, the majority 80% shares in the third respondent were to be held by the second respondent and the appellant. The first respondent acknowledged the appellant's contribution and participation as an investor, but questioned the extent of his involvement and his rights arising from it.

[8] The crucial part of the appellant's claim herein lies in what he claimed to be a collateral understanding between him, the first and second respondents, for his agreement to come in as an investor. In sum, the alleged principal terms for the appellant's participation as an investor are *inter alia* as follows:

(i) the second respondent would hold 80% shares in the third respondent and the appellant is the beneficial owner of part of the said 80% shares in the third respondent;

(ii) the appellant would be entitled to participate in the third respondent's equity, either directly, or through the second respondent's shareholdings at a later stage; and

(iii) the first respondent agrees to the appellant's participation in the third respondent's equity, and that no further consent is required for the second respondent's divestment of any part of the 80% shares in the third respondent to the appellant.

[9] It is also contended that the first defendant was aware of the collateral understanding as the latter had negotiated the terms on the first respondent's behalf and that he was invited to attend the first board meeting of the third respondent on 18 December 2012. In the event which transpired, however, differences arose between representatives of the first respondent and the second respondent namely the first defendant and Captain Suresh respectively which threatened the viability of the project undertaken by the third respondent.

[10] Further averment can be gleaned from the statement of claim in which it is stated that the appellant wanted the joint venture in the third respondent to cease, however the first defendant had convinced him otherwise. The appellant relented. A shareholders' agreement was thereafter entered between the first, second and third respondents on 15 March 2013 ('the shareholders agreement'). Subsequently, the third respondent entered into a 'Harbour Tug Services Agreement' with Vale Malaysia Minerals Sdn Bhd on 11 April 2013.

[11] The appellant also emphasises that although he is not a named shareholder of the third respondent and is instead a beneficial owner of part of the 80% shares in the third respondent, he has at all material times participated in the business and operational matters of the third respondent in respect of the project, premised on the collateral understanding. This, he further contends, cemented his belief that the first defendant and the first respondent had acknowledged his beneficial ownership of part of the 80% of the third respondent's shares held in the second respondent's name.

[12] Pursuant to the collateral understanding, sometime in or around November 2015, the appellant requested for the transfer of 10% shares in the third respondent from the second respondent to himself. The 10% shares in the third respondent held in the second respondent's name was therefore transferred to the appellant on 16 December 2015. The appellant also claims that the first respondent did not object to it then, and that business went on as usual.

[13] In this action, the appellant *inter alia* seeks a declaration that:

(i) the first respondent is bound by the terms of the collateral understanding;

(ii) the transfer of 10% ordinary shares in the third respondent does not require the consent of the first respondent;

(iii) the appellant is the legal and registered beneficial owner of the 10% shares in the third respondent;

(iv) the plaintiff is entitled to purchase or receive the transfer of the 70% shares in the third respondent registered in the name of the second respondent and the transfer does not require the consent of the first respondent;

(v) the terms and conditions as set out in cls. 4 and 9.1 of the shareholders agreement are unenforceable and inapplicable in respect of any transfer of the shares in the third respondent in the name of the second respondent to the appellant; and

(vi) an injunction to restrain the first defendant and the first respondent from commencing and continuing any legal proceedings or arbitration which affects or impacts upon the rights attached to the 10% and 70% shares registered in the name of the appellant and the second respondent respectively without the presence of the appellant as a party to such legal proceedings or arbitration.

[14] The first respondent however disagrees with the appellant's contention. They are clearly aggrieved with the transfer, and denies the existence of any collateral understanding. Instead, it is the first respondent's pleaded defence that equity structure of the third respondent is 80:20 between the second and first respondents respectively which is in accordance with the shareholders' agreement. They also allege that the transfer of shares to the appellant is in contravention of the terms and conditions of the shareholders agreement in particular cl. 9.1 which prohibits the transfer of shares in the third respondent to a third party. This led to the first respondent issuing a notice of breach dated 1 July 2016 against the second and third respondents. The appellant however, contends that the first respondent had breached the collateral understanding by issuing this notice.

[15] Pursuant to the said notice of breach, on or about 19 October 2016, the first respondent commenced arbitration proceedings against the second and third respondents pursuant to the arbitration clause in the shareholders agreement. This was done through the Kuala Lumpur Regional Centre for Arbitration. We must highlight that the ambit of the arbitration clause is not an issue in this appeal.

[16] The reliefs sought by the first respondent in the arbitration proceedings are reproduced below:

(i) a declaration that the transfer of the third respondent's 10% shares from the second respondent to the appellant was in breach of the shareholders agreement;

(ii) an order that the first respondent is entitled to purchase the 10% transferred shares of the third respondent;

(iii) an order that the first respondent is entitled to purchase the second respondent's remaining 70% shares in the third respondent; and

(iv) liberty to apply for specific performance and/or damages in relation to the 10% transferred shares after the conclusion of the KLHC Suit No. WA-22NCVC-544-08/2016 (the 544 Suit).

[17] The first respondent between July 2016 to February 2017 had also commenced three civil suits in the Kuala Lumpur High Court ('KLHC') against the second and third respondents. It is of some significance to observe that these civil suits were filed before the appellant commenced the present action on 8 May 2017. The suits and their nature in summary are as follows:

(a) KLHC Originating Summons No. WA-24NCC-280-07-2016 ('OS 280 Suit') dated 1 July 2016 filed by the first respondent against the second and third respondents in which the first respondent seeks to obtain an injunction to prevent the second respondent from disposing or dealing with its remaining 70% shares in the third respondent, and also the third respondent from disposing its 10% shares held in the appellant's name, pending the conclusion of the arbitration proceedings;

(b) the OS 9 Suit filed by the first respondent on 17 February 2017 wherein the first respondent seeks to prevent the third respondent from proceeding with an Extraordinary General Meeting fixed on 23 February 2017 to amongst others, remove the first defendant from the third respondent's board of directors; and

(c) the 544 Suit filed on 25 August 2016 by the first respondent against the appellant premised on the tort of inducement, where it seeks to claim damages from the appellant for inducing the second and third respondents to breach the shareholders agreement. The 544 Suit was filed by the first respondent separately against the appellant in relation to the impugned transfer as the appellant was not a party to the arbitration agreement.

It is also necessary to mention that the instant action namely the 165 Suit was ordered to be transferred to and consolidated with the 544 Suit and was registered as WA-22NCC-113-03-2018.

[18] To revert at this point to the injunction application, it ought to be highlighted that midstream the hearing of the said injunction application, the second and third respondents moved an application to stay the proceeding in the instant action pending the determination of the arbitration and the 544 Suit. The learned judge heard the injunction application and the stay application together. His Lordship acceded to the injunction application by the appellant and granted the restraining order but dismissed the stay application by the second and third respondents on 6 November 2017. The appeal filed by the second and third respondents to the Court of Appeal against the dismissal of their stay application was subsequently withdrawn. We may venture to add that the arbitration proceedings had in the meanwhile reached an advanced stage when it was heard for two days on 1 November 2017 and 2 November 2017 before being restrained by the injunction order.

The Decision Of The High Court

[19] As earlier mentioned, the learned judge allowed the injunction order and dismissed the stay application. We set out below the main points of the reasons for the decision to allow the injunction order:

(i) as the appellant was not subjected to the shareholders agreement, the appellant was not and could not be made a party to the arbitration proceedings. The provisions in the Arbitration Act 2005 (Act 646) have no bearing on the injunction application;

(ii) the test set out in the cases cited by counsel for the first respondent is of no relevance to the injunction application, as the parties in those cases were the subject of the arbitration clauses or agreement;

(iii) the applicable test in relation to the appellant's injunction application is the test set out in *Keet Gerald Francis Noel John v. Mohd Noor & Ors* [1995] 1 CLJ 293; [1995] 1 MLJ 193. In this regard, the learned judge finds that there are serious issues to be tried, damages would not be an adequate remedy when it comes to the issue of shares of a company that is not readily available in the open market and the balance of convenience lies in favour of the court proceedings over the arbitration for the reason that, amongst others, there is a possibility of conflicting outcomes;

(iv) the advantage of having the court proceedings takes priority is obvious, as all the relevant parties are involved in the court proceedings and the contesting claims over the shares in the third respondent can be ventilated in the court proceedings; and

(v) there is no inordinate delay and in any event the learned judge accepts the explanation proffered by the appellant.

The Decision Of The Court Of Appeal

[20] The Court of Appeal heard the first respondent's appeal on 27 June 2018 and gave its judgment on 24 July 2018 allowing the said appeal. The Court of Appeal's decision can be shortly stated. It was held that Act 646 does not oust the jurisdiction of the court to grant an injunction to restrain an arbitration, but the exercise of the discretion will now be more sparing than before. The provisions of sub-ss. 10(1) and 10(3) of Act 646 apply to persons who are non-parties to arbitration proceedings. The Court of Appeal referred to the test propounded in *Keet Gerald Francis, supra,* and decided that it was a general test for the grant of interim injunctions and had no application in a case where the subject matter was arbitration proceedings, which was subject to the provisions of Act 646 in particular, s. 8, sub-ss. 10(1) and 10(3). Accordingly, the learned judge had erred in applying the *Keet Gerald Francis* test instead of the test in *J. Jarvis & Sons Limited v. Blue Circle Dartfort Estates Limited* [2007] EWHC 1262 (TCC) in allowing the injunction order. The underlying principles of Act 646 were respect for party autonomy and selfrestraint by courts when intervening in arbitral process. The general principles for a court to grant an injunction to restrain arbitration proceedings were set out in *J. Jarvis, supra*. Nowhere in *J. Jarvis* was it stated that the principles would be inapplicable to non-parties to arbitration proceedings. Had the learned judge applied the *J. Jarvis* test, the appellant's application would have been found to have fallen far short of the requirements set out in the *J. Jarvis* test, being that the continuance of the arbitration proceedings would be "oppressive, vexatious, unconscionable or abuse of process".

[21] The Court of Appeal had also decided that a higher threshold ought to be applied to a non-party to arbitration proceedings who applies to restrain arbitration proceedings because as a non-party, he was not bound by any award made in the arbitration proceedings. Further, according to the *J Jarvis* test, inordinate delay was a material factor and could be fatal to an application for an injunction. It was found that no reasonable explanation was proffered by the appellant to justify the delay of 20 months. On the issue of multiplicity of suits and possibility of inconsistent findings between the court and arbitration, the Court of Appeal held that it was no longer material consideration under Act 646. The Court of Appeal then referred to the case of *Bina Jati Sdn Bhd v. Sum-Projects (Brothers) Sdn Bhd* [2002] 1 CLJ 433; [2002] 2 MLJ 71 stating that it was decided prior to the enactment of Act 646. Thus, the Court of Appeal held that the learned judge had misdirected himself in referring to *Bina Jati* and placing importance on the prospect of multiplicity of proceedings as a ground to restrain arbitration proceedings.

Finally, the Court of Appeal held that the High Court had erred in not giving due consideration to the pending arbitration between the first, second and third respondents which the court was bound to refer parties to arbitration unless it found that the shareholders agreement was null and void, inoperative or incapable of being performed to justify the injunction to restrain arbitration proceedings as required under sub-s. 10(1) and by virtue of the objective of Act 646.

Decision

[22] The two questions of law for which leave to appeal was granted turn on the issue as to whether the provisions of Act 646 apply to a party litigant, namely the appellant, in court proceedings who is neither a party to an arbitration agreement nor arbitration proceedings. The relevant provisions of Act 646 which fall to be considered by this court in connection with these leave questions are ss. 10 and 8 thereof. The critical issue for our determination which emerges from the leave questions is whether the appellant, who is not a party to the arbitration proceedings, should be given the right to have his claim on the shares in the suit heard first and restrain the respondents who are privy to arbitration agreement from proceeding with the arbitration proceedings. The law must be taken to be well settled that the court, pursuant to O. 29 and its inherent jurisdiction under O. 92 r. 4 of the Rules of Court 2012, has a discretion to grant an injunction in favour of an applicant and such discretion, in our judgment, may also be exercised to restrain an arbitration from proceeding.

[23] It is to be recalled that the Court of Appeal in its decision held that both ss. 10 and 8 as enacted in Act 646 applied to the appellant's claim in the instant suit and the injunction application. As was to be expected, the main contention urged on behalf of the appellant involves the logical argument that the findings of the Court of Appeal in relation to ss. 10 and 8 was a misdirection as well as an error of law. The result, learned counsel submits, is therefore that the appeal ought to be allowed.

[24] However, from the respondent's standpoint, the Court of Appeal's decision is correct adopting the stance that the arbitration proceedings would not affect the appellant's right since, being a non-party thereto, any award made would not bind him. Learned counsel additionally presents the contention that the leave questions deal with the issue of whether ss. 8 and 10 of Act 646 apply to the appellant who is not a party to any arbitration agreement and the arbitration proceedings submitting that the questions miss the point made by the Court of Appeal, which is that, in considering the anti-arbitration injunction application by the appellant who is not a party to any arbitration agreement and the arbitration proceedings, the court should:

(i) have due regard to the objective of Act 646, which is respect for party autonomy and a non-interventionist policy of courts, and the sparing exercise of the court's discretion to grant an injunction to restrain arbitration;

(ii) take cognizance of pending arbitration proceedings;

(iii) not allow a non-party to derail pending arbitration proceedings on the premise that Act 646 does not apply to the appellant; and

(iv) not allow a non-party to arbitration to circumvent and undermine the objective of Act 646.

[25] Accompanying the above submission is the first respondent's further contention that the Court of Appeal's decision is that to that extent stated in the preceding paragraph, it is incorrect to say that Act 646 does not apply to the appellant. In other words, the court should not completely ignore ss. 8 and 10 of Act 646 just because the appellant is not a party to the arbitration agreement and the arbitration proceedings. It is not the Court of Appeal's decision that the appellant has to satisfy the requirements of s. 10 of Act 646 to obtain the anti-arbitration injunction. In short, citing the Federal Court's decision in *Seni Jaya Sdn Bhd & Anor v Dato' Hj Ahmad Tarmizi Hj Puteh & Anor* [2019] 1 CLJ 713, the leave questions do not specifically address the findings of the Court of Appeal and therefore need not be answered by this court. Leave question No.1 is framed on the presupposition that the arbitration proceedings would affect the appellant's proprietary rights. Learned counsel for the first respondent bolsters his submission by contending that the arbitration proceedings would not affect the appellant's rights, if any, because:

(i) any award in the arbitration proceedings would not bind him who is not a party thereto; and

(ii) in so far as his claims over shares in the third respondent currently registered in:

(a) the second respondent's name, this is the subject matter of the instant action and the appellant would still be able to recover these shares if he succeeds in the action regardless of the outcome of the arbitration proceedings or whether the shares are registered in the second or first respondent's name at the time judgment is delivered in the consolidated suit in question;

(b) the appellant's name, the first respondent's prayer in the arbitration proceedings is for "liberty to apply for specific performance and/or damages" in relation to the 10% shares "after the conclusion of

(Suit 544)"; put another way, the first respondent acknowledges that it has to succeed against the appellant in the 544 Suit first before going back to the arbitration proceedings for the relief of specific performance.

[26] We begin, before going more closely into the matter, by quoting from Act 646 the provisions of ss. 8 and 10 relevant to this appeal which read:

Extent of court intervention

8. No court shall intervene in matters governed by this Act, except where so provided in this Act.

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Arbitration agreement and substantive claim before court

10(1) **A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement** shall, where a **party** makes an application before taking any other steps in the proceedings, **stay those proceedings and refer the parties to arbitration** unless it finds that the agreement is null and void, inoperative or incapable of being performed.

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(3) Where the **proceedings referred to in subsection (1) have been brought, arbitral proceedings may be commenced or continued,** and an award may be made, **while the issue is pending before the court**.

(emphasis added)

[27] We shall endeavour, in our deliberation, to consider the effect of s. 10 first. Our deliberation on s. 8 will follow thereafter. With respect to s. 10, the Court of Appeal held that the said section applied to persons who were non-parties to arbitration proceedings laying emphasis to the underlying principles of Act 646 which was respect for party autonomy and self-restraint by courts when intervening in arbitral process. The Court of Appeal relied on *J. Jarvis, supra,* as authority in support thereof. Premised upon the said finding, the Court of Appeal in para. [43] of its judgment held that the learned judge had erred:

(a) in not giving due consideration to the pending arbitration between the three respondents and the objective of Act 646;

(b) in his finding that since the appellant is non-party to the arbitration, Act 646 does not apply to the appellant's application; and

(c) in not making any finding of the nullity of the shareholders agreement to justify the injunction to restrain arbitration proceedings, as required under sub-s. 10(1) of Act 646.

[28] By way of emphasis, a point of significance may be distilled from s. 10 which explains the intended meaning thereof. It is indeed the provision which governs the mandatory stay of court proceedings in respect of a matter which is the subject of an arbitration agreement between the plaintiff and the defendant thereto. Thus, where the plaintiff commences court proceedings against a defendant and in relation to the subject matter of the claim in court, the plaintiff and the defendant have an agreement to arbitrate, in the event that either party moves for a stay of the court proceedings, a mandatory stay would be granted unless the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed. This is a clear and unarguable peremptory statutory provisions which the parties to court proceedings are bound to follow provided the requirements of s. 10 as stated above are fulfilled.

[29] The Court of Appeal in its judgment particularly in paras. [39], [43], [49] and [64] seems to have given undue and unnecessary regard and importance to the fact that the appellant did not show that the arbitration agreement is null and void, inoperative or incapable of being performed. In fact, in para. [43] of the grounds of judgment, the Court of Appeal emphasised that the learned High Court Judge made no finding on the nullity of arbitration agreement to justify the injunction order. This is a clear reference to sub-s. 10(1) that a mandatory stay would be granted unless the arbitration agreement is null and void, inoperative or incapable of being performed.

[30] We have no temerity to ignore or even deny that where it can be shown that the arbitration agreement is null and void, inoperative or incapable of being performed, a stay of the court proceeding ought not to be allowed. We would say though that there was no necessity for the Court of Appeal to do so in this action. The opening words of sub-s. 10(1) of Act 646 set out the ambit of court proceedings which would potentially attract the application of the said section. The pertinent words are "A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall …". These words manifestly indicate that the proceedings before the court relate to the matter which is the subject of an arbitration agreement. Based on the scrutiny of the appeal records, it is becoming increasingly apparent that with regard to the appellant's claim in the instant action, the subject matter thereto is not the subject matter of the arbitration agreement as between the appellant and the first respondent. The

A simple question central to this appeal therefore, which is the proper forum to resolve the dispute between the parties herein, should it be in the arbitration proceedings or it ought to be resolved in the court proceedings.

[31] We would, for this purpose refer to the definition of the phrase "arbitration agreement" in s. 9 of Act 646 which defines it as follows:

B

Definition and form of arbitration agreement

9(1) In this Act, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

C

The uncontroverted fact is that the appellant is not a party to the arbitration agreement nor arbitration proceedings. By s. 2 of Act 646, the word "party" is defined to mean:

… a party to an arbitration agreement or, in any case where an arbitration
D does not involve all the parties to the arbitration agreement, means a party to the arbitration.

[32] By way of emphasis, an important point that we would like to make at this juncture is that in this case it is as plain as a pikestaff that there is no arbitration agreement as between the appellant and the first respondent as
E defined in s. 9 of Act 646, whether in relation to the subject matter of the appellant's claim in this action or otherwise. The appellant is also not a party to the arbitration proceedings as defined in s. 2 of Act 646. It is thus not possible for the appellant or the first respondent to refer this action to arbitration. The appellant's claim in this action and the injunction
F application therefore do not come within the ambit and scope of sub-s. 10(1) of Act 646.

[33] After giving much consideration to this issue, we are satisfied that there is a good deal of substance in the argument put forward by learned counsel for the appellant that nothing material turns upon the fact that the
G appellant has not shown and that the learned judge made no finding that the arbitration agreement as between the first to the third respondents is null and void, inoperative or incapable of being performed to justify the injunction order. The word "agreement" appearing latterly in sub-s. 10(1) of Act 646 indisputably refers to the words "arbitration agreement" which appear
H therein earlier. As between the appellant and the respondents, we accept as uncontroverted that there is in truth no arbitration agreement in respect of the appellant's claim in this suit and the injunction application. Therefore the need for the learned judge to make the finding as required by the Court of Appeal does not even arise.

I

[34] The court below us decided that the injunction ought to be set aside given that the requirements stipulated in sub-s. 10(1) of Act 646 had not been fulfilled. We for one, certainly do not profess ignorance to the fact that the enactment of Act 646 marks the shift to a position of respect for party autonomy and a non-interventionist policy of the court. In fact the Court of Appeal acknowledged this clear shift of legislative policy "once the requirements in the Act have been satisfied" when it had cited and placed reliance on the Federal Court's decision in *Press Metal Sarawak Sdn Bhd v. Etiqa Takaful Bhd* [2016] 9 CLJ 1 which clearly explained the legislative intent of Act 646.

[35] It does not escape our notice that this is also the position adopted for the first respondent. It is important to highlight at this point that *Press Metal, supra*, is a case involving parties to an arbitration agreement *albeit* one where the matter in dispute was whether an arbitration clause was effectively incorporated into a later contract by reference. Upon deciding that the arbitration clause had been effectively incorporated, the Federal Court went on to make a trite assertion that in law parties were bound by the terms of the arbitration agreement which they had voluntarily executed. On the contrary, it is an undisputed fact that the appellant herein is not a party to the arbitration agreement.

[36] Next, *Press Metal* concerns an application for a stay of court proceedings pending arbitration under sub-s. 10(1) of Act 646 by the defendant. The present action, however, concerns an application by the appellant for an interim injunction to restrain the prosecution of an arbitration to which he is not a party but which would affect his proprietary rights. For this reason alone, it becomes immediately clear that the learned judge rightly decided that the arbitration ought to be restrained from proceeding further.

[37] In any event, the Court of Appeal had failed to take into account the first respondent's acknowledgement of the non-applicability of s. 10 of Act 646 to the appellant's injunction application. In fact, we can glean from the appeal records that in the course of submission in the High Court and the Court of Appeal, learned counsel for the first respondent had tacitly acknowledged that the provisions of Act 646, in particular s. 10, had no express application to the appellant unless the second and third respondents were made co-plaintiffs to the instant action or made co-applicants to the instant application with the appellant. This is further fortified by the first respondent's claim in the 544 Suit which is premised on the tort of inducement against the appellant. By the commencement of the 544 Suit, the first respondent has in fact recognised and their counsel has also submitted to the effect that in the 544 Suit, the first respondent's claim as against the appellant is by way of litigation and not arbitration because the appellant is

not a party to the arbitration agreement, notwithstanding that the subject matter in the relief sought as against the appellant in the 544 Suit is substantially similar to their relief sought in the arbitration proceedings.

[38] Subsection 10(3) of Act 646 is linked to sub-s. 10(1). This can be seen by the opening words "Where the proceedings referred to in sub-s. (1) have been brought …". It ought to be emphasised that the word 'proceedings' refers to the court proceedings which are brought in respect of a matter which is the subject of an arbitration agreement. In our judgment, sub-s. 10(1) of Act 646 is of no application and does not apply to the applicant's claim in the instant suit as it is plain that the matter in respect of which the instant action is brought is not the subject of an arbitration agreement between the parties to this action. That being the case, sub-s. 10(3) of Act 646 is also of no application. The conclusion which emerges is that since sub-ss. 10(1) and 10(3) of Act 646 are of no application to this action, to contend otherwise is an overreach and leans away from the clear legislative intent of the provisions of the law in Act 646.

[39] Let us now turn to the next point of importance which learned counsel for the appellant has submitted. It relates to s. 8 of Act 646. We think it is legitimate to begin by referring to the relevant passage of the Court of Appeal's decision in relation to s. 8 wherein it is stated in para. [60] thereof that the test referred to in *Keet Gerald Francis, supra*, has no application on the facts and circumstances of this case which is the subject matter of arbitration proceedings and therefore is subject to the clear and express provisions of sub-ss. 10(1) and 10(3) and s. 8 of Act 646. In other words, this decision, we apprehend, is clearly grounded on the court's finding that the facts and circumstances of this case is the subject matter of arbitration proceedings and as such, the instant case is governed by Act 646.

[40] At the core of the appellant's case is the argument urged on his behalf that the finding of the Court of Appeal is a misdirection or an error of law in relation to the injunction order as such the exercise of the discretionary power in dismissing the injunction application is vitiated. The appellant's argument taken before this court on the issue of s. 8 of Act 646 is that the said section does not apply to this case. We will say it again that s. 10 of Act 646 is indeed a provision in which powers of the court to grant a stay of court proceedings while arbitration proceedings have been brought are prescribed in peremptory language. We would say though, that insofar as this case is concerned, where s. 10 of Act 646 is found to be not applicable to the appellant's claim and the injunction application, it inevitably follows, like night follows day, that s. 8 of Act 646 is of no application either. The Court of Appeal, with respect is therefore in error in relation to s. 8 when it held that the same applied to the instant case. There can be little doubt that neither

the appellant is a party to, nor his claim is the subject matter of, any arbitration agreement and above and beyond that the appellant is not a party to any arbitration proceedings.

[41] We will go further to say that, upon reading the judgment of the Court of Appeal on this point, the conclusion at which we are constrained to arrive is this; that the powers of court in relation to arbitral proceedings have been expressly prescribed in Act 646. Besides s. 10, these powers are provided in ss. 11, 13(7), 15(3), 18(8), 29, 37, 41, 44(1), 44(4), 45 and 46 of Act 646. The provisions are clearly of utility to parties to arbitration proceedings only as it allows them to make various applications to the court relating to their arbitral proceedings upon which the court is empowered to make certain orders. The Court of Appeal having decided that the learned judge had erred in his finding that Act 646 did not apply to the appellant's injunction application (para. [43]) and the said injunction application was subject to the clear and express provisions of Act 646 in particular sub-ss. 10(1), 10(3) and s. 8, ought to have deliberated on the effect of its ruling on these provisions. Such deliberation however is notably absent from the Court of Appeal's judgment.

[42] To hold, as did the Court of Appeal, that s. 8 of Act 646 applies to the appellant's claim and the injunction application would result in an absurdity. We take that view because it is clear to us that the Court of Appeal did not seem to realise that none of the above prescribed powers under Act 646 are of application or utility to the appellant for the simple reason that there is neither arbitration agreement nor arbitration proceedings in relation to the claim in court. What needs to be emphasised for the purpose of this case is that the wide jurisdiction and powers conferred upon court by the above mentioned provisions in court proceedings relating to arbitration would be severely curtailed, constricted or fettered in instances where there is no arbitration agreement and the claim before the court is not before arbitration as is the appellant's case herein. Absurdity will thus inevitably ensue in the event that s. 8 of Act 646 is held to be applicable to a non-party to any arbitration proceedings or arbitration agreement such as the applicant. Section 8 therefore does not apply to the appellant's claim in the instant suit and the injunction application.

[43] The first respondent contends that the leave questions need not be answered asserting that the questions miss the point made by the Court of Appeal which we have highlighted in para. [24] of this judgment. The Court of Appeal makes express findings that ss. 8 and 10 of Act 646 apply to the appellant. This finding can be gleaned from paras. [40], [43] and [60] of its grounds of judgment. The issue is whether the provisions of Act 646 applies

to the appellant. Accordingly, in view of the decision of the Court of Appeal, the questions posed in this appeal have to be answered. The first respondent's contention on this point is without doubt untenable. We would add that even if the questions of law posed are not answered, an appeal may still be disposed by allowing the appeal without the need to answer the leave questions in instances where it can clearly be shown that the Court of Appeal has erred (see *Zen Courts Sdn Bhd v. Bukit Jalil Development Sdn Bhd & Ors* [2018] 7 CLJ 283; [2017] 1 MLJ 301 and *Jeffery Law Siew Su & Ors v. Yu Gui* [2017] 4 CLJ 665; [2017] 3 MLJ 1).

[44] Notwithstanding the above findings, it is necessary for this court to proceed to address other related issues dealt with in the grounds of judgment of the Court of Appeal as well as the submissions of learned counsel for the respective parties. It is useful to remember that the Court of Appeal rejected the general test of interlocutory injunctions in *Keet Geral Francis* holding in para. [69] of its grounds of judgment that it was a wrong test. We must highlight in this regard that the general test for interlocutory injunctions as laid down in *Keet Gerald Francis* is whether there are issues raised by the parties in the suit that are serious enough to merit a trial. In doing so, the court has to ask itself whether the totality of the facts presented before it discloses a *bona fide* issue to be tried.

[45] However, what has clearly emerged from the decision of the Court of Appeal in the present suit is the imposition of a higher threshold than the general test laid down in *Keet Gerald Francis* on the appellant being a non-party to the arbitration and the adoption of the test set out in the United Kingdom's authority of *J. Jarvis* which was urged upon this Court by the first respondent in line with the rationale and objective of Act 646. According to the Court of Appeal, the general test laid down in *Keet Gerald Francis* has no application in the instant case where the parties in the arbitration are different from the parties in the suit before the court. Essentially, the Court of Appeal held that the *J. Jarvis* test was applicable to the injunction application as the provisions of Act 646 were applicable and if a stranger to an arbitration agreement was allowed easily to restrain arbitration proceedings, the rationale and objective of Act 646 would be seriously undermined by those who were a non-party to arbitration.

[46] We must now turn to the case much relied upon by the first respondent. In *J. Jarvis,* the main contractor was the claimant in the court proceedings and defendant in the arbitration. The defendant in the court proceedings was the claimant in the arbitration. The claimant in the court proceeding sought to obtain an injunction to prevent the continuance of the arbitration proceedings. Both parties were parties to the arbitration agreement. The High Court there in para. [40] derived four propositions from the review of authority:

(i) The court's power under section 37 of the Supreme Court Act 1981 to grant injunctions includes a power to grant an injunction to restrain an arbitration from proceeding.

(ii) That power may be exercised if two conditions are satisfied, namely:

(a) the injunction does not cause injustice to the Claimant in the arbitration and

(b) the continuance of the arbitration would be oppressive, vexatious, unconscionable or an abuse of process.

(iii) The court's discretion to grant such an injunction is now only exercised very sparingly and with due regard to the principles upon which the Arbitration Act 1996 is expressly based.

(iv) Delay by the party applying for an injunction is material to the court's exercise of discretion and may in some cases be fatal to the application.

[47] As with our Act 646, the UK Arbitration Act 1996 which was considered by the High Court in *J. Jarvis* sets out two principles and these are respect for party autonomy and self-restraint by the courts when intervening in the arbitral process. The High Court tackled the application for the injunction and found that the arbitration could not be characterised as oppressive, vexatious, unconscionable or an abuse of process.

[48] Now, reverting to the present appeal, one thing is clear, that is that the basis for the imposition of a higher threshold is flawed because Act 646, as we have earlier held, does not apply to the appellant. It therefore follows that the Court of Appeal has misdirected itself in rejecting the *Keet Gerald Francis* test. We can discern a difference between *J. Jarvis* and the instant suit. In a nutshell, the *J. Jarvis* test is inapplicable and is of no relevance to a non-party to arbitration proceedings. In the *J. Jarvis* line of cases, parties seeking an injunction to restrain arbitration proceedings are the contracting parties to the arbitration agreement. This feature and distinction are crucial. In such cases, where a party to arbitral proceedings seeks to restrain the continuance of the arbitration proceedings a higher or different test or threshold imposed would be a logical and sensible requirement given the contractual obligations entered into by the party seeking to restrain the arbitral proceedings. Put in another fashion, the plaintiff who seeks to restrain arbitral proceedings is a party to an arbitration agreement and a party to the arbitral proceedings. This is not the case in the present suit. We have said several times that the appellant is not a party to the arbitration agreement and proceedings.

[49] *J. Jarvis* had relied upon the UK Court of Appeal's decision of *The "Oranie" and The "Tunisie* [1966] 1 Lloyd's Rep 477. In the *The "Oranie"* and *The "Tunisie"*, a more stringent test was imposed as the applicant for the injunction to restrain the arbitration proceedings was a party to the arbitration agreement. This was expressly recognised and may be seen from the following passages which appear at p. 482:

> One starts, as it seems to me, with the fundamental point that the two parties to the present application before me have agreed that the disputes arising under these charter-parties should be dealt with by arbitration in this country. Accordingly, to succeed in getting a stay of such an arbitration the applicant for a stay has to go further than showing the mere balance of convenience, that it might be desirable to hold the arbitration up until the French proceedings have been determined; he has to show firstly that the continuance of the arbitration would work an injustice because it would be oppressive or vexatious, or would be an abuse of the process of the Court in some other way. Secondly, he must show that the stay must not cause an injustice to the plaintiff.
>
> …
>
> …
>
> I start with the proposition, that it is desirable and of apparent importance that the parties should carry on their contracts, and if the parties have agreed to arbitrate in this country **it is right that they should hold to that bargain unless there are exceptional circumstances.** (emphasis added)

[50] As recognised by the Court of Appeal in this suit, parties who have contracted to arbitrate their disputes should be held to their bargain. However, obviously, the appellant cannot be held to the so-called bargain since he has no agreement to arbitrate with the first and second respondents in respect of the appellant's claim in the instant suit. We cannot thus accept this view.

[51] It is necessary to stress at this juncture that the rationale for the imposition of a higher or more stringent test in the *J. Jarvis* and *The "Oranie"* and *The "Tunisie"* is consistent and accord with the cases involving exclusive jurisdiction clause the reason being that arbitration clauses and exclusive jurisdiction clauses are both contractual in nature.

[52] Stating the matter very generally, in an application for injunction to restrain or stay arbitration proceedings, or for an anti-suit injunction which has the effect of preventing a party from bringing a claim in any forum other than the forum parties agree to submit, strong reasons are required to displace the contractual obligation entered into in relation to an arbitration clause or an exclusive jurisdiction clause. Suffice if we refer to one leading English authority in support of this proposition. The decision of the House of Lords in the case of *Donohue v. Armco Inc & Ors* [2002] 1 All ER (Comm) 97 bears out exactly the logical basis for the above proposition in the following passages:

Per Lord Bingham at p. 107 in para. [24] E-H:

> *Where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it.* Whether a party can show strong reasons, sufficient to displace the other party's *prima facie* entitlement to enforce the contractual bargain, will depend on all the facts and circumstances of the particular case. (emphasis added)

Per Lord Hobhouse of Woodborough at p. 116 para. [45] F-G:

> The position of a party who has an exclusive English jurisdiction clause is very different from one who does not. The former has a contractual right to have the contract enforced. The latter has no such right. *The former's right specifically to enforce his contract can only be displaced by strong reasons being shown by the opposite party why an injunction should not be granted.* (emphasis added)

[53] In *Donohue, supra,* three key contracts for the sale of shares in the insurance group contained a clause on exclusive jurisdiction of the English courts to settle any dispute which might arise out of the agreement. Armco, began proceedings in New York against Donohue and Donohue applied for an anti-suit injunction which would have the effect of preventing Armco from bringing claims arising from the sale of the insurance group against Donohue in any forum other than England. The House of Lords held that where the parties had bound themselves by an exclusive jurisdiction clause, effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it.

[54] There is certainly force in the above proposition as the rationale in *Donohue*, although enunciated in the context of an exclusive jurisdiction clause, is also applicable to cases involving an arbitration clause. This is because similar to an exclusive jurisdiction clause, an arbitration clause is also contractual in nature. Besides, there are also judicial pronouncements equating the legal principles in relation to exclusive jurisdiction clause to arbitration clause. Thus in *Inter Maritime Management Sdn Bhd v. Kai Tai Timber Company Ltd, Hong Kong* [1995] 4 CLJ 164; [1995] 1 MLJ 322 the Court of Appeal at p. 328 G-H propounded the opinion that there was really no difference in principle between cases where an application to stay an action was made on the ground that there was an exclusive jurisdiction clause and those cases where a stay was sought upon the ground that there was in existence an agreement to refer disputes to arbitration. A plaintiff in either case was required to show strong grounds why he should not honour the bargain he made with the defendant. In both kinds of cases the court had a discretion to permit litigation to continue before it. The decision in *Inter*

Maritime Management Sdn Bhd, supra in fact is no different from the principle propounded by the Federal Court of Australia in *Kraft Foods Group Brands LLC and Another v. Bega Cheese Ltd* 130 IPR 434 in para. [105] when it held that the same statement in assessing the effect of an exclusive jurisdiction clause was equally applicable in assessing an arbitration clause.

[55] The point of importance which we would like to make is that where however, there are no such contractual obligations on exclusive jurisdiction, parties are at liberty to pursue claims in any convenient forum where they can found jurisdiction. This may be seen from the judgment of Lord Bingham in *Donohue* at p. 111e:

> There is, as always, another side to the coin. All five Armco appellants have a clear *prima facie* right to pursue against Messrs Rossi, and Stinson and their respective companies any claim they choose in any convenient forum where they can found jurisdiction. They have successfully founded jurisdiction in New York. **There is, as I have already concluded, no ground upon which this court could properly seek to restrain those proceedings.** (emphasis added)

It is important to stress that all five Armco appellants could do so because Messrs Rossi and Stinson and their respective companies were not a party to the sale and purchase agreement in respect of the shares in the insurance group, so none had the benefit of the English courts exclusive jurisdiction clause.

[56] In our case, it cannot be denied that the appellant has found jurisdiction in respect of this case in court. In fact, this suit (together with the 544 Suit) is at the trial stage. This is a further fortification of the appellant's case that the dispute between the appellant and the first respondent in relation to the shares of the third respondent is the subject matter of curial proceedings and not arbitral proceedings besides the uncontroverted fact that the appellant does not have such a contractual obligation *vis-a-vis* the three respondents since he is not a party to the shareholders agreement and also not a party to the arbitration proceedings.

[57] However, learned counsel for the first respondent takes his argument further when he submits that *J. Jarvis, The 'Oranie'* and *The 'Tunisie'* and *Lin Ming & Anor v. Chen Shu Quan & Ors* [2012] HKCU 557 do not say that the principles therein are inapplicable to non-parties to arbitration proceedings applying for anti-arbitration injunction. We have been very careful in perusing through these cases, but upon reading them all, the conclusion at which we are constrained to arrive is that we cannot glean anything decisive and with equal force that the decisions in these cases apply to non-parties. For the reasons set out above, we do not consider that we are assisted on this

appeal by the *J. Jarvis* and *The "Oranie"* and *The "Tunisie"* line of cases. These cases are clearly of no application to the appellant's claim in this action and the injunction application.

[58] Notwithstanding the above findings, let us proceed on the premise that the *J. Jarvis* test is applicable to the instant injunction application. The following point of relevance is adopted by the first respondent in their submission. This point concerns their concession that any award in the arbitration proceedings does not bind the appellant. It ought to be mentioned that, notwithstanding this alleged concession, there has been manifest absence of any further concession that any arbitral award will not affect or impinge upon the appellant in relation to the present suit. Moreover, it is also significant to take into account that the first respondent has not dealt with the issue raised by the appellant, namely, the attendant consequences in the event that an arbitral award in favour of the first respondent is then registered as a court order. Thus significantly, absent any further concession and in view of the silence on the part of the first respondent on the attendant consequences in the event of a registration of the arbitral award as a court order, we hold that the alleged concession without more remains coy, uncertain and qualified. In the event, we do not think that the first respondent's concession can be accepted as a meritorious ground upon which the court ought to dismiss the injunction application.

[59] We shall next focus on the argument with respect to multiplicity of proceedings and risk of inconsistent findings. The Court of Appeal held that the issue of multiplicity of proceedings and possibility of inconsistent findings as expounded in *Bina Jati, supra*, are no longer material factors to oust the jurisdiction of an arbitrator under Act 646 in view of the decision in *J. Jarvis.* The High Court in *J. Jarvis*, we apprehend, said that all of those observations relating to concurrent proceedings and the risk of inconsistent findings were true but it was an inevitable consequence of the mandatory language of s. 9 of the UK Arbitration Act 1996 that from time to time there would be concurrent proceedings in court and before an arbitrator. The decision of the Court of Appeal in the instant action, in our view, effectively sets to naught the principles laid down by the same court in the case of *Bina Jati, supra* and as affirmed by the Federal Court in the case of *Chase Perdana Bhd v. Pekeliling Triangle Sdn Bhd & Anor* [2008] CLJ 313; [2007] 7 MLJ 677 that where some are parties and others are not parties to the arbitration it is best that their disputes be dealt with by the court and that disputes between parties cannot be divided so that part is dealt with by arbitration and another part in court. In short, what the Court of Appeal and the Federal Court in both cases are trying to emphasise is that the risks inherent in split litigation ought to be avoided.

[60] After giving much consideration to the submissions on both cases, we take the view that the principles set out in *Bina Jati* and *Chase Perdana, supra* are of utility and application in the instant case especially in the context of competing claims in curial and arbitral proceedings and where not all parties are before both forums. It matters not that both the leading authorities on this issue namely *Bina Jati* and *Chase Perdana* were decided prior to Act 646. This is plainly not a material factor as the instant application is not governed by or subject to Act 646. In any event, those principles are equally applicable to the present action notwithstanding they were said in the context of the Arbitration Act 1952. We accept that courts may decline to give effect to the exclusive jurisdiction clause or arbitration clause where interest of third parties are involved or where there is a risk of parallel proceedings and inconsistent decisions arising out of the conduct of an arbitration.

[61] Furthermore, once a duplication between two proceedings is identified it immediately becomes relevant for the court to consider an intersection of two powerful considerations and these are firstly, the desire of courts to hold commercial parties to their bargain and secondly, the desire of courts to avoid disruption and multiplicity or duplicity of litigation, in particular to avoid parallel proceedings and the risk of inconsistent findings, as well as to avoid the causing of inconvenience to third parties (*Incitec Ltd v. Alkimos Shipping Corporation* [2004] FCA 698 at pp. 12 and 13).

[62] So far as it concerns the present appeal, only the above second consideration is applicable and paramount as the appellant is not a party to the commercial bargain, that is, the arbitration clause. In *Incitec Ltd, supra* at p. 14, the court held that courts in the UK and Australia had expressed "deep and strong antipathy for the promotion of circumstances allowing for inconsistent curial approaches to the same dispute". Our review of relevant authorities below confirms this finding. Thus in *Lin Ming, supra*, the Hong Kong High Court there in para. [54] held:

> [T]his Court accepts that it is in general undesirable to have parallel proceedings in this jurisdiction involving the same factual disputes, with the concomitant risk of inconsistent factual findings.

The UK Court of Appeal in *Aratra Potato Co. Ltd. and Another v. Egyptian Navigation Co. (The "El Amria")* [1981] 2 Lloyd's Rep 119 in holding that the two actions should be tried together, had this to say:

> I regard it as a **potential disaster** from a legal point of view if they were not, because of the risk inherent in separate trials, one in Egypt and the other in England, that the same issues might be determined differently in the two countries.

[63] Likewise, Lord Bingham in his speech in *Donohue, supra*, at p. 112 emphasised that a procedure which permitted the possibility of different conclusions by different tribunals, would run directly counter to the interests of justice. Lord Scott at p. 122 said on this point:

> … it is the **evident absurdity** of requiring some claims resulting from the alleged secret agreement to be litigated in England notwithstanding that the rest will be litigated in New York that is the overriding factor. There are … very strong reasons indeed for the normal injunctive protection that the exclusive jurisdiction clause would warrant to be withheld in this case. (emphasis added)

[64] In the case of *Halifax Overseas Freighters Ltd. v. Rasno Export; Techno Prominport; and Polskie Linie Oceaniczne PPW (The "Pine Hill")* [1958] 2 Lloyd's Rep 146 at p. 152, the UK High Court held:

> I think that a serious risk would be run that **our whole judicial procedure**, at any rate in relation to this claim, **would be brought into disrepute** if, as I have indicated is a serious possibility, you get conflicting questions of fact decided by the two different tribunals … (emphasis added)

[65] The Australian court too adopts a similar stance where in *Recyclers of Australia Pty Ltd and Another v. Hettinga Equipment Inc and Another* 175 ALR 725, the Federal Court at para. [66] held as follows:

> The broad discretion arises as part of the exercise of a court's general power to control its own proceedings. The basis for the discretion is that the spectre of *two separate proceedings – one curial, one arbitral – proceeding in different places with the risk of inconsistent findings on largely overlapping facts, is undesirable.* (emphasis added)

[66] Having reviewed the catenation of the foregoing relevant authorities in which we agree, we are compelled to add that the desire of courts to avoid disruption and multiplicity of litigation, in particular to avoid parallel proceedings and the risk of inconsistent findings, and to avoid the causing of inconvenience to third parties also rests on court's powers to protect its own proceedings and processes by granting anti-arbitration injunction. In *Kraft Foods Group Brands LLC, supra*, the Federal Court of Australia considered this legal assertion and held:

> Therefore, the critical question that falls to be decided in this case is whether restraining the taking of any further steps in the arbitration is necessary for the administration of justice to protect this court's own proceedings or processes.

In fact, it is the court's powers to protect the integrity of its own processes that authorize the grant of anti-suit injunctions. Accordingly, it was held by the Australian High Court in *CSR Ltd v. Cigna Insurance Australia Ltd and Others* 146 ALR 402 at p. 433:

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> The counterpart of a court's power to prevent its processes being abused is its power to protect the integrity of those processes once set in motion. … it is that counterpart power of protection that authorizes the grant of anti-suit injunctions.

[67] In the present case, the learned judge had given due and proper regard
B to the undesirability of possible conflicting decisions in paras. [71] to [86] of his grounds of judgment. The approach adopted by the learned judge is also consistent with the various judicial pronouncements cited above with the view to circumventing multiplicity of proceedings. Further, the approach of the learned judge is also consistent with the need to protect the integrity of
C court proceedings in this suit.

[68] Citing the Singapore case of *Tomolugen Holdings Ltd and Another v. Silica Investors Ltd; and Other Appeals* [2016] 1 LRC 147, the learned judge observed that the case also pertained to the right of parties who were not subject to the arbitration proceedings and that the ultimate solution must
D serve the ends of justice. To this end, the following circumstances, the appellate court in *Tomolugen, supra,* held, must be considered:

(a) the relationship between the parties to the court proceedings and the parties to the arbitration;

E (b) the claims in the court proceedings and those in the arbitration;

(c) issue estoppel;

(d) the risk of inconsistent findings between the two sets of proceedings;

(e) the risk of delay; and

F (f) cost

[69] We are in agreement with the learned judge that the primary consideration on whether to grant the injunction to restrain the arbitration proceedings where the rights of a non-party thereto are involved is what would be the fairest approach to all parties. It must not result in any party
G suffering a severe disadvantage and for the ends of justice to be met, the benefits must outweigh the advantage. The learned judge is correct when His Lordship considered that where the issues relate to any party who is not subjected to arbitration, priority should be given for the matter to be dealt with by the court particularly:

H

(i) where the matter was the same as with in the instant case and that this would be the fairest approach as the non-party to the arbitration proceedings would not be left out in the cold and his rights affected;

(ii) where this would avoid conflicting results arising from the two parallel
I proceedings;

(iii) if the arbitration is to proceed followed by this suit, the issues there would have to be relitigated, this time involving the appellant's claim;

(iv) that any arbitral award given would necessarily involve the shares that were the subject matter of this action thereby impacting the appellant's claim over the shares;

(v) that the issues in the arbitration and this suit overlapped, thus if the appellant succeeded in this suit and the first respondent also succeeded in the arbitration proceedings, the second and third respondents would have great difficulty in complying, once the arbitral award was enforced through a High Court; and

(vi) the appellant's claim would not be ventilated at the arbitration proceedings, but this suit would enable all material parties to be included and the advantage of having the court proceedings taking priority over the arbitration was obvious, as all the relevant parties were involved in this suit.

[70] We must now embark upon a consideration of the issue of commonalities between the instant suit, the 544 Suit and the arbitration proceedings. No doubt, we find clear and unarguable similarities and significant overlap between both suits and the arbitration proceedings. In summary, the identical issues relate to the 10% shares in question, the remaining 70% shares in the third respondent registered in the name of the second respondent and the shareholder agreement. The reliefs sought in the arbitration proceedings and the two suits are:

(a) in the arbitration proceedings, declaration that the transfer of the 10% shares in the third respondent from the second respondent to the appellant is in breach of the shareholder agreement. In the instant suit the appellant seeks to declare that he is the legal and beneficial owner of the said 10% shares and that the transfer of these shares by the second respondent does not require the consent of the first respondent; and

(b) in the arbitration proceedings, a declaration that the first respondent is entitled to purchase from the second respondent the 10% shares and the remaining 70% shares in the third respondent from the second respondent. The appellant in the instant suit seeks a declaration that he is entitled to purchase or receive the transfer of the 80% in the third respondent registered in the second respondent's name.

[71] Therefore, due to the similarities highlighted above, it has become immediately clear that apart from the above possibilities and risks, costs will also be duplicated in the event that both the present consolidated suit and the arbitration proceedings are to proceed simultaneously. We are also mindful that the application by the second and third respondents to stay the

proceedings in this suit had been dismissed and the appeal to the Court of Appeal against the decision had been withdrawn. In fact, as we have indicated earlier, this suit and the 544 Suit are already at the trial stage. These factors, taken together with the other risks and possibilities discussed above attach a very strong and significant degree of credence to the argument of the appellant that this suit should take precedence over the arbitration. Hence the injunction granted by the learned judge is undoubtedly correct.

[72] A perusal of the grounds of judgment of the Court of Appeal also reveals that no consideration is given to the real possibility of a conflicting or inconsistent arbitral award if it is registered as a court order. This then logically raises the question that begs to be answered, that is, what will be the outcome if the appellant were to succeed in this action. The obvious outcome in our view is that the appellant may be hamstrung in terms of seeking to enforce the relief obtained herein in the event that both the first respondent and the appellant are successful in their respective arbitral and curial proceedings.

[73] In a recent decision of the Court of Appeal in the case of *Protasco Bhd v. Tey Por Yee & Another Appeal* [2018] 5 CLJ 299, Protasco as plaintiff had sued three defendants. Protasco's claim as against the first defendant was subjected to an arbitration clause. A mandatory stay was granted in favour of the first defendant. Protasco's claims as against the second and third defendants were not subject of any arbitration clause. The second and third defendants applied to stay Protasco's claims. This stay application was dismissed by the High Court but on appeal, the Court of Appeal allowed the stay. The Court of Appeal held that Protasco's claims against the second and third defendants thereto in the High Court should proceed first in time over the arbitration as between Protasco and the first defendant thereto. This was achieved via a temporary stay of the said arbitration proceedings as between Protasco and the first defendant thereto.

[74] In its decision, the Court of Appeal in *Protasco, supra*, held that s. 10 of Act 646 was inapplicable and did not come into play as the second and third defendants were non-parties to the arbitration agreement. The court's power to grant a stay is derived from its inherent power to stay court proceedings pending arbitration in the interests of the justice of the case. The decision in *Protasco* is instructive and the finding it made that s. 10 of Act 646 is inapplicable to the third parties accords well with our decision in this appeal.

[75] The Court of Appeal in this suit also dealt with the issue of multiplicity of proceedings by referring to a passage from *J. Jarvis*. We would observe that in this regard the Court of Appeal did not give due consideration to the circumstances in *J. Jarvis* which materially differ from the circumstances in the instant suit. The relevant facts in *J. Jarvis* in summary

are these. Jarvis had an arbitration agreement with Blue Circle. Blue Circle commenced an arbitral proceeding against Jarvis. Subsequently, Jarvis sought to restrain the arbitration by reasons of, amongst others, the potential multiplicity of proceedings and risk of inconsistent findings with a potential suit that may be brought by a third party against Jarvis and Blue Circle. It is interesting to note that at the time Jarvis commenced the injunction proceedings, there were no concurrent proceedings brought by the third party against both Jarvis and Blue Circle. The learned judge there treated the absence of concurrent proceedings as an obstacle in Jarvis's path. The third party said that such proceedings were imminent, but it had been saying that for the last six years. It was far from clear when the third party would actually get around to issuing such proceedings. As such, the learned judge in *J. Jarvis* held that he could not approach Jarvis' injunction application on the basis that there were or there almost were concurrent proceedings in court as well as in arbitration.

[76] Jarvis' concern that it might be mulcted in damages twice was also considered by the High Court when it decided that such concern was allayed by an appropriate undertaking proffered by Blue Circle to the third party to pay an amount equal to any damages awarded to Blue Circle in the arbitration proceedings. There was, essentially no real fear of inconsistent findings as the claim in the arbitral proceedings and the potential claim in the court proceedings were different. In the arbitral proceedings, Blue Circle had also sought, amongst others, for an indemnity from Jarvis in the event that Blue Circle were to be held liable to the third party in the court proceedings. In the court proceedings, the third party as plaintiff intended to sue Jarvis and Blue Circle for damages. One will see that the circumstances in *J. Jarvis* clearly differ from the circumstances in this action. The Court of Appeal obviously did not consider the differences in circumstances in *J. Jarvis* and the instant appeal.

[77] We are pressed by the first respondent's counsel with the argument that both the court proceedings and arbitral proceedings may run concurrently or in parallel even though all disputes arise from the same facts. It is necessary to refer on this point to the case of *Carter Holt Harvey Ltd v. Genesis Power Ltd* [2006] 3 NZLR 794 a decision of the New Zealand High Court in which Carter Holt sued Genesis Power (premised upon contract) and Rolls Royce (premised upon negligence) in court. This contract was between Carter Holt, Genesis Power and Kinleith, and did not contain any arbitration clause. Subsequently, Genesis Power commenced arbitration against Rolls Royce based on a separate contract entered into between them. The contract contained an arbitration clause. Rolls Royce moved the court in the suit commenced by Carter Holt for a stay of the arbitration commenced by Genesis Power. The High Court dealt with the issue of

whether the stay application might be brought as an interlocutory application and whether there was jurisdiction to grant a stay of the arbitration proceedings. The court proceedings commenced by Carter Holt did not engage the application of s. 8 of the New Zealand Arbitration Act 1996 (which is similar to our s. 10 of Act 646). The possibility of concurrent proceedings (curial and arbitral) was envisaged by Randerson J, and the learned judge held at p. 807 that it would be inappropriate to have both court and arbitral proceedings to proceed simultaneously. His Lordship said:

> [61] *Except to the extent clearly limited by statute, this Court has a wide discretion to prevent abuse of its own processes. It is possible to envisage a case where there is such a substantial degree of overlap of factual or legal issues that it would be inappropriate for both Court and arbitral proceedings to proceed simultaneously, even if the matters in the Court proceeding were not the subject of an arbitration agreement in a way which would engage art 8.* While a Court might well be reluctant to intervene in such circumstances, I would not wish to preclude the Court's jurisdiction to do so in an appropriate case. I express no view as to whether the present case might fall into that category. (emphasis added)

[78] Randerson J also referred to UK authorities on the issue of coextensive or overlapping proceedings in court and arbitration at p. 800 in the following manner:

> [27] *But the Courts have long recognised the existence of inherent jurisdiction to order the stay of arbitral proceedings where there are coextensive or overlapping proceedings in the Court and before an arbitral tribunal.* The authorities were summarised by Judge Humphrey Lloyd QC, sitting in the Queen's Bench Division, in *University of Reading v. Miller Construction Ltd* at pp 41-45.
>
> [28] The leading decision is that of the English Court of Appeal in *Doleman & Sons v. Ossett Corporation* [1912] 3 KB 257. Moulton LJ drew attention at pp 268-269 to the *undesirability of a race between the Court and a private tribunal dealing with the same subject-matter.* Farwell LJ held at pp 273-274 that the plaintiffs could not be deprived of their right to have recourse to the Court unless the Court made an order to that effect under s. 4 of the then Arbitration Act (UK). (emphasis added)

[79] It is important to highlight that the cases of *University of Reading* and *Doleman* cited in *Carter Holt Harvey Ltd, supra*, were decided during the regime of their underlying Arbitration Act in which a stay of court proceedings was at that material time discretionary as opposed to mandatory. However, nothing turns on this fact. We cite those passages to demonstrate the court's approach when there are co-extensive or overlapping proceedings in court and before an arbitral tribunal. The appellant's claim in the instant suit and the arbitration proceedings fall squarely within such circumstances. Hence, it would be inappropriate and undesirable for this suit and the arbitration proceedings to run concurrently. The learned High Court Judge had given due regard to this aspect.

[80] The first respondent relies on the case of *Intermet FZCO and Others v. Ansol Limited and Others* [2007] EWHC 226 (Comm) for the aforesaid proposition. The argument that both proceedings may run concurrently is clearly untenable. In fact, the weight of authorities which we have considered earlier point in the other direction. Moreover, in *Intermet, supra,* the claimant in arbitration and plaintiff in court proceedings were one and the same party namely, Intermet FZCO. The claims in the arbitration were contractual in nature whilst the claim in court was premised upon fraud. Ansol Limited applied for an interim injunction to restrain Intermet FZCO from proceedings with arbitration proceedings commenced by the latter pending the hearing and final determination of the court proceedings. Gloster J whilst expressly recognising that it would be convenient that one tribunal should determine all the issues between all the parties held that in reality, that could not be achieved. This is what the learned judge said:

> 30. *In those circumstances, I see no reason why Intermet and Ves should be prevented from exercising their undoubted contractual rights to pursue their contractual claims in the Arbitration against Ansol. Whilst it would be convenient that one tribunal should determine all the issues between all the parties, that cannot, in reality, be achieved.* I consider it would be unjust to deprive Intermet and Ves of their right to arbitrate the issues subject to the arbitration agreement contained in the General Agreement as allegedly varied. (emphasis added)

Gloster J also found no risk of there being inconsistent findings:

> 31. As Miss Otton-Goulder submitted, *the Commercial Court proceedings will determine the fraud issues whereas the Arbitration will determine the less complex contractual issues. Moreover, I see no risk of there being inconsistent findings, since, no doubt, insofar, as there are any adverse findings against the Claimants, issue estoppel will arise to prevent them from re-arguing or re-litigating such issues in the Commercial Court proceedings.* (emphasis added)

Thus, the High Court in *Intermet FZCO* did not see any risk of there being inconsistent findings. Hence, both proceedings were allowed to proceed concurrently.

[81] In the present appeal, there is without doubt a significant degree of multiplicity, duplication and overlap of issues in the arbitration, this suit and the 544 Suit. Multiplicity of concurrent proceedings and duplicity of issues ought to be avoided and circumvented. The subject matter in this suit, the 544 Suit and the arbitration proceedings, as we have earlier found, are the same, namely, the 10% shares in the third respondent presently registered in the name of the appellant and part of the 70% shares in the third respondent presently registered in the name of the second respondent. In terms of the injunction order, the net effect is such that the court proceedings should proceed ahead of the arbitration proceedings. By analogy, this was the end

result achieved and held by the Court of Appeal in the *Protasco* case. Hence, the Court of Appeal misdirected itself in law and in fact in rejecting the issue of multiplicity of proceedings and risk of inconsistent findings as a material and relevant factor in the instant injunction application.

[82] The appellant's injunction application does not fall far short of the requirements set out in the *J. Jarvis* test. This is because there is no prejudice to the first respondent in the event that an injunction is granted. In this regard, the first respondent is at liberty to also pursue the 544 Suit in which the first respondent is seeking similar relief in relation to the 10% shares in the third respondent as against the appellant. The fact that this suit and the 544 Suit are now at trial stage amply fortifies our finding. The said 10% shares in the third respondent which are the subject matter of dispute are presently preserved, whether through undertakings or injunction orders. In our judgment, it would be oppressive, vexatious and unconscionable for the arbitration proceedings to continue because the appellant is not a party thereto while his proprietary rights are sought to be impinged. Further to the above, it is just plainly inappropriate for the first respondent, in their move to ensure that their arbitration ought to be heard first, to ride roughshod over the appellant who stands in their way and whose claim is similar and inextricably linked to the claims before the arbitration. This is made manifest by the fact that where the arbitration is allowed to proceed first, it will be a trial against the appellant in absentia. By way of emphasis, we would also say that there is the need to circumvent multiplicity of proceedings to avoid the same subject matter of both proceedings from being fought on two fronts before different tribunals and risks of inconsistent findings. In our judgment there can be no doubt whatsoever that these are real risks and possibilities, not a mere fanciful scenario.

[83] Another reason advanced before us on behalf of the first respondent relates to the issue of the appellant's delay in applying for the injunction. The law is that if this delay is always explainable such delay will not become an obstacle in the appellant's path. There is without question that it is within the function and discretion of the learned judge to deal with the matter. The Court of Appeal, applying J. Jarvis considered a delay of nearly ten months after the appellant was made aware of the arbitration proceedings as inordinate and fatal to the application for an injunction. The High Court on the contrary held that there was no inordinate delay on the part of the appellant and the chronology of events justified why the application was filed at the material time.

[84] It is trite "principle that while delay is a relevant factor in interlocutory proceedings for injunctive relief, not all delay is bad delay or, to be precise, inexcusable, as it may be explained or inevitable." (*Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors* [1995] 1 CLJ 461; [1995] 1 MLJ 241 at p. 262). Further to the above principle, the High Court in *Lim Hean Pin v. Thean Seng Co Sdn Bhd & Ors* [1992] 2 CLJ 828; [1992] 2 CLJ (Rep) 745; [1992] 2 MLJ 10 emphasised that delay may be of importance when the balance of convenience is being determined, but much will depend upon the particular circumstances of each case. In other words, the delay is often explicable by reference to other circumstances, for example, a plaintiff might have delayed the institution of proceedings because he wished to obtain better means of providing his case. Edgar Joseph J (as His Lordship then was) went on to find as a fact that such delay had been satisfactorily explained by counsel for the plaintiff. The Supreme Court in *Alor Janggus Soon Seng Trading Sdn Bhd, supra*, also laid emphasis on the fact that what was important to consider was not so much the length of the delay but whether the delay had in some way made it unjust to grant the injunction claimed.

[85] The learned High Court Judge in the instant appeal had exercised original discretion vested upon him in finding that there was no inordinate delay on the part of the appellant and accepted the explanation proffered by him. The learned judge had also expressly referred to the affidavit evidence of the appellant affirmed on 20 September 2017 on the issue of the alleged delay in particular para. [23] thereof. The appellant in this regard had explained the various circumstances in the said affidavit as well as his first affidavit deposed on 29 August 2017 leading to the filing of this suit on 5 February 2017. Moreover, a perusal of the record of appeal reveals that the full extent of the first respondent's claims in the arbitration proceedings were reflected in its points of claim which came about only on 28 March 2017. The injunction application was filed on 29 August 2017 the reason being that, the appellant did not wish to escalate matters as there were ongoing without prejudice negotiations to resolve the impasse and settled the dispute globally as alluded to by the appellant in both affidavits. In short, the appellant viewed these negotiations ought to be given an opportunity to hopefully yield a positive result without any escalation of fresh proceedings.

[86] The Court of Appeal does not appear to have considered the explanation proffered by the appellant on the alleged delay in his affidavits and instead of doing so, the Court of Appeal, without assigning any reason found that there was no reasonable explanation provided by the appellant that would justify the delay of ten months. On the contrary, we ought to mention that the learned High Court Judge had considered the affidavit of the appellant and found that the chronology of events justified why the application for the injunction was filed at the material time. Further mention

must also be made of the fact that His Lordship did not disregard or hold that delay was not a material factor, instead he exercised his discretion accordingly which he was entitled to do so. There is clearly no misdirection on his part. With respect, the Court of Appeal fell into error on the issue of delay. We are satisfied that the alleged delay is explicable and the forbearance of parties who are in the midst of settlement negotiations is an acceptable and satisfactory explanation in the circumstances of this case. It would be unreasonable for the appellant to rush off to the court the moment the disputes arose. He had ongoing relationship with the respondents and negotiations towards settlement of the disputes and we can understand as did the learned High Court Judge, the reluctance on the part of the appellant to file the application for injunction. We accept such reluctance was for good reasons premised on a commercial reality. As the Court of Appeal in the case of *Golden Screen Cinema Sdn Bhd v. MTM Realty Sdn Bhd & Another Appeal* [2008] 4 CLJ 785; [2009] 1 MLJ 72 had succinctly put it at p. 791 (CLJ); p. 77 (MLJ):

> It is a commercial reality that businessman do not wish to create an antagonist relationship in circumstances where there are negotiations on foot for a transaction.

[87] The allegation of a ten month delay is thus misplaced. Having considered the explanation proffered by the appellant and for the reasons already given, we do not consider that the delay has in some way made it unjust to grant the injunction sought or to have been such a nature as to disentitle the appellant to the relief. The learned judge, on the facts of the present case had exercised his discretion correctly.

[88] The argument of the first respondent which we may now consider focuses on the issue of the objective or policy of Act 646. It is contended that the court must give due regard to the objective of Act 646 and its legislative policy and that the Court of Appeal is correct in alluding to the underlying policy of Act 646. On the point of legislative policy and object of a statute, Lord Macnaghten in the case of *Vacher & Sons Ltd v. London Society of Compositors* [1913] AC 117-18 observed:

> A judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction.

The Federal Court in *Sri Bangunan Sdn Bhd v. Majlis Perbandaran Pulau Pinang & Anor* [2007] 5 CLJ 673; [2007] 2 MLRA 187 held:

> In construing a statute the duty of the court is limited to interpreting the words used by the legislature and to give effect to the words used by it. The court is not entitled to read words into a statute unless clear reason for it is to be found in the statute itself.

[89] To find the meaning of a statute, the starting point must always be to bear in mind the court's duty, as an interpreter of legislation, which is to construe the statute in order to arrive at and stay close to the legal and grammatical meaning primarily intended or ascribed by the legislature as can be gleaned from a scrutiny of the wording of the statute. The wisdom, expediency, policy or object of a statute is the province of the statesmen and not the courts or the lawyer to discuss, and the legislature ought to determine what is best for the public good through legislative enactments. The court ought to administer the law as it stands (*NS Bindra's Interpretation of Statutes*, 12th edn, Amita Dhanda, p. 25).

[90] Our duty would be to expound the language of the statute in accordance with the settled rules of construction (*NKM Holdings Sdn Bhd v. Pan Malaysia Wood Bhd* [1986] 1 LNS 79; [1987] 1 MLJ 39, *Kao Che Jen v. N. Chanthiran Naggapan* [2015] 9 CLJ 295). The law is that where the language of the law is clear, effect is to be given to that meaning without it being necessary or proper to consider further the desirability of the result or the application of any other rule of construction (*Craies On Legislation: A Practitioners' Guide To The Nature, Process, Effect And Interpretation Of Legislation,* 11th edn, Editor Daniel Greenberg p. 25).

[91] The language of Act 646 in particular ss. 8 and 10 is clear and unambiguous. It does not apply to the third party such as the appellant. The clear words of Act 646 must therefore prevail and it is not necessary to glean Parliament's implied intention in the face of such clear words and its manifest intention. While it cannot be denied that the policy and object of this particular statute is to promote respect for party autonomy and selfrestraint by courts when intervening in arbitral process, such legislative policy and object must be construed within the ambit of the statute itself. The Court of Appeal had in effect misconstrued Act 646 when it wrongly held that firstly the High Court did not give due consideration to the objective of Act 646 and secondly, the High Court found that Act 646 did not apply to the appellant's application (paras. [40] and [43] of the grounds of judgment). The Court of Appeal instead erroneously held in para. [40] of its grounds of judgment that it was incorrect to say that Act 646 did not apply to the appellant and in para. [60] thereof that the facts and circumstances of the case are subject to the clear and express provisions of Act 646, in particular sub-ss. 10(1), 10(3) and s. 8 thereof. We cannot glean a great deal from the grounds of judgment of the Court of Appeal and the argument put forward by learned counsel on behalf of the first respondent that is very decisive or that it manifests a good deal of substance on the issue of legislative policy or objective of Act 646. When Act 646 does not apply to a non-party to arbitral proceedings, a logical proposition that follows is that it would be manifestly wrong to extend its policy to the said non-party. Where the law is defective and inadequate it is the business of Parliament to amend it.

[92] Our perusal of Act 646 raises no real doubt that applying the settled rules of construction, the Act does not apply to the appellant. The learned High Court Judge correctly and adequately considered relevant factors in granting the injunction order upon which we are entirely in agreement with His Lordship that these factors would be the fairest approach to all parties for the end of justice to be met. Shortly stated, the decision of the Court of Appeal is far reaching. It applies Act 646 to the appellant, a non-party to the arbitral proceedings and the arbitration agreement when the Act is clear upon careful scrutiny of the wording therein. Act 646 is of no application to the appellant's claim in this suit and the injunction application and consequently nothing turns on the first respondent's argument on the underlying legislative policy of Act 646.

[93] On this subject, the case of *Salford Estates (No. 2) Ltd v. Altomart Ltd (No. 2)* [2015] 3 WLR 491 is also cited by the first respondent in its written submission in support of their argument on the relevancy of legislative policy of Act 646 to this appeal. In the said case, the petitioner moved for a winding up against the respondent company. The debt on which the petition was based arose out of a contract containing an arbitration agreement between the petitioner and the respondent company. Section 9 of the UK Arbitration Act 1996 (which is equivalent to our s. 10 Act 646) did not apply to the winding up petition and hence a mandatory stay thereto could not be obtained. Notwithstanding the same, the Court of Appeal held that sub-s. 122(1) of the Insolvency Act 1986 ought to be exercised in the manner consistent with the legislative policy of the UK Arbitration Act 1996. For otherwise, parties to an arbitration agreement would be able to bypass the arbitration agreement by presenting a winding up petition. The aforesaid decision is found in the following passages of the judgment UK Court of Appeal:

> [1] The issue on this appeal is whether, and if so in what way, the stay provisions in section 9 of the Arbitration Act 1996 apply to a *petition to wind up a company* on the ground of its inability to pay its debts *where the debt on which the petition is based arises out of contract containing an arbitration agreement.*
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> [...]
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> [39] *My conclusion that the mandatory stay provisions in section 9 of the 1996 Act do not apply in the present case is not, however, the end of the matter. Section 122(1) of the 1986 Act confers on the court a discretionary power to wind up a company. It is entirely appropriate that the court should, save in wholly exceptional circumstances which I presently find difficult to envisage, exercise its discretion consistently with the legislative policy embodied in the 1996 Act.* This was the alternative analysis of Warren J in the Rusant case, at para 19.

[40] … *Exercise of the discretion otherwise than consistently with the policy underlying the 1996 Act would inevitably encourage parties to an arbitration agreement – as a standard tactic - to bypass the arbitration agreement and the 1996 Act by presenting a winding up petition.* The way would be left open to one party, through the draconian threat of liquidation, to apply pressure on the alleged debtor to pay up immediately or face the burden, often at short notice on an application to restrain presentation or advertisement of a winding up petition, of satisfying the Companies Court that the debt is *bona fide* disputed on substantial grounds. *That would be entirely contrary to the parties' agreement as to the proper forum for the resolution of such an issue and to the legislative policy of the 1996 Act.*

[41] … For the reasons I have given, I consider that, as a matter of the exercise of the court's discretion under section 122(1)(f) of the 1986 Act, *it was right for the court either to dismiss or to stay the Petition so as to compel the parties to resolve their dispute over the debt by their chosen method of dispute resolution rather* than require the court to investigate whether or not the debt is *bona fide* disputed on substantial grounds. (emphasis added)]

[94] Unlike *Salford Estates (No. 2) Ltd, supra*, in the instant appeal, the appellant has no arbitration agreement with the first respondent on dispute resolution. The first respondent's contention that parties to an arbitration agreement may avoid arbitration by having a non-party apply for an injunction is misplaced and borders on a distortion of the present case. The appellant in this appeal is asserting his own individual proprietary rights and claim. Therefore, *Salford Estates (No. 2) Ltd* is of no application to this appeal. We find the first respondent's argument premised on the decision of the UK Court of Appeal's decision in *Salford Estates (No. 2) Ltd* clearly unsustainable and must therefore be rejected.

[95] We now turn to the last two remaining issues that have been pressed on us in this court by the first respondent. This is the issue of judicial admission allegedly made by the appellant in the 544 Suit in which he pleaded that the question of whether the second respondent and the third respondent has, by the impugned transfer of the 10% shares, breached the shareholders agreement is subject to the arbitration proceedings and the question of the alleged tactical manoeuvre in respect of which it is contended that the appellant files this injunction application as a tactical ploy to scuttle the hearing of the arbitration. The learned High Court Judge had dealt with both issues and found no merits thereto. The Court of Appeal, though, did not make any findings in favour of the first respondent on these issues.

[96] We agree with the learned judge that the appellant's pleaded defence could not amount to judicial admission. This is because all the three respondents are parties to the shareholders agreement. One of the terms of the said agreement is that any issues to the agreement would be subjected to arbitration proceedings. The respondents have assented to participate in the

A arbitration proceedings. It is in this context that the appellant has pleaded his defence in the 544 Suit, in that all the three respondents are subjected to the arbitration proceedings by virtue of the shareholders agreement. The appellant is not a contracting party to the shareholders agreement and the foundation of his claim is not with the said agreement but with what he
B alleged as the collateral understanding. As the appellant is not a party to the shareholders agreement, he could not seek recourse through the arbitration proceedings. He could only ventilate his claim through this suit.

[97] With respect to the issue of tactical manoeuvre, we agree with the learned judge that the injunction sought is to restrain the arbitration
C proceedings and that it is done for the appellant's benefit, particularly as the subject matter of the claim is the shares that the appellant has staked his claim. The appellant's application in essence is the appellant's bid to preserve his claim over the shares.

[98] In conclusion, generally it is often said that an injunction would issue
D where the balance of justice is as such. In the present case, we find that the learned judge correctly concluded that the balance of justice was in favour of the injunction order. We make this finding as this is apparent from our careful perusal of the grounds of judgment of the learned judge. We are satisfied that there are serious issues to be tried and the balance of
E convenience lies in favour of the instant case proceedings over the arbitration for the reasons earlier given. We would mention that the second and third respondents did not object to the injunction application. However, it is also of some significance to observe that it is never the position of the appellant that the application ought to be granted given that the second and third
F respondents did not object thereto. In fact the appellant's position throughout is to the effect that it is incumbent upon the appellant to establish his own case and to justify the grant of the injunction sought and this he actually succeeds in doing so. In a nutshell, there were no appealable errors made by the learned judge in the proper exercise of his discretion to grant the injunction sought warranting the intervention of the Court of Appeal. The
G inevitable outcome, as previously indicated, is that the appeal herein is allowed with costs in favour of the appellant and the order of the Court of Appeal dated 24 July 2018 is set aside. In the end, we answer the two leave questions in the negative. The order of the High Court dated 6 November 2017 is restored and an injunction is issued upon the terms of the said order
H of the High Court.

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